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REPORTS
OF
CASES IN LAW AND EQUITY,
DETERMINED IN THE
S U P R E M E C O U R T
OF
THE STATE OF IOWA.

BY GEORGE GREENE,
ONE OF THE JUDGES.

VOL. IV.

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JUDGES OF THE SUPREME COURT
DURING THE TERM OF THIS VOLUME.

HON. JOS. WILLIAMS, Chief Justice,
" J. F. KINNEY, Judge,
" GEO. GREENE, "
" J. C. HALL, "

ATTORNEY GENERAL,
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CLERK OF THE SUPREME COURT,
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CASES
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA,
IOWA CITY, JUNE TERM, A. D., 1853,
In the seventh year of the State.

PRESENT :
HON. JOSEPH WILLIAMS, *Chief Justice*.
" JOHN F. KINNEY, } *Judges*.
" GEO. GREENE, }

DUBUQUE CO. v. DUBUQUE AND PACIFIC RAILROAD COMPANY.

A county has the constitutional right to aid in building a railroad within its limits.

The proceedings under which the citizens of Dubuque county voted two hundred thousand dollars to aid in constructing the Dubuque and Pacific railroad through that county, were regular, and authorized by law.

Section 114 of the Code applicable to railroads.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This case was taken from the county court of Dubuque county to the district court, and the following points were submitted for adjudication :

1. The constitutional right of the county to assist in the construction of a railroad within its limits.

2. The regularity and legality of the proceedings under which the citizens of Dubuque county voted the credit of the county to the amount of two hundred thousand dollars

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to assist in building the Dubuque and Pacific Railroad through that county.

3. Whether the Code of Iowa authorizes such proceedings and subscriptions.

These points were decided in the affirmative, and thereupon the prosecuting attorney took an appeal to this court, and claims that the court below should have decided each point in the negative.

1. The constitutionality of such a vote is to be considered. As the objection to such votes has been so gravely raised and seriously urged, it has been supposed by many that our state constitution, either in express terms or by strong implication, deprives the citizens of all power to vote the credit or money of their county to any railroad or other improvement within the county limits. But the constitution does not make the slightest allusion to any such restriction, and the only clause to which we are referred in this connection is that which defines the legislative department (art. 3,) and under this we are admonished that the general assembly cannot confer upon the people the power to legislate: *Delegare non delegatum est*. But what has that maxim to do with the constitutional right of the people to vote for or against an appropriation of their money, or a tax upon their property, for a specific object, recognized and regulated by laws already enacted? Such a vote involves no act that has the slightest approximation towards legislation. It neither creates nor repeals any law. It leaves the statutes in all respects just as it found them. It is merely an expression of popular sentiment, under which the county judge is authorized to do or not to do a certain thing in the manner defined by law. As the people have not in the constitution delegated this power to vote upon such propositions, nor in any way conceded or divested themselves of the right, but have in express terms affirmed in the bill of rights that "all political power is inherent in the people,"—art. 1, § 2,—we conclude that the people may with constitutional propriety

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vote the credit of their county to aid in the construction of a railroad within its limits.

But it is said that the constitution limits the state indebtedness to one hundred thousand dollars, and that therefore all the counties in the state cannot contract or create a greater debt in the aggregate, than the general assembly might create. That such county indebtedness would be a debt within the state to be provided for by taxation, and thus liabilities would be created which are repugnant to the constitution. It is also argued that as "the state cannot directly or indirectly become a stockholder in any corporation," so counties cannot become stockholders without indirectly making the state a stockholder. Under such logic, individuality is blended into mad confusion. A county is magnified into a state, and no distinction recognized. If those state restrictions are applicable to counties, they must be equally applicable to the cities, and citizens of the state. It may, with equal propriety, be said that the citizens of Iowa cannot in the aggregate contract debts exceeding one hundred thousand dollars, and that no citizen can become a stockholder in any corporation. There is quite as much identity and affinity between a citizen and the state, as there is between a county and the state. But no one will contend that a constitutional restriction upon the state government is also a restriction upon a citizen of the state; how then can it be claimed that such a state restriction should be enforced against a county? Such a construction would be latitudinarian in the extreme.

2. We are next to consider whether the proceedings in this case, under which the vote was given, were regularly conducted. It appears that a petition, signed by a large portion of the citizens of Dubuque county requesting that the question might be submitted to a vote of the people, whether the county should assist in the construction of the Dubuque and Pacific Railroad, was submitted to the county judge; and the facts were established before him that the first division of the road for which aid was re-

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quested was located entirely within the county limits ; that the proceeds of the bonds to be issued under the proposed vote would be used exclusively on such division of the road within the county ; that said road was as necessary for the convenience of the people as any other road previously constructed in the county ; that the business of the county required increased traveling facilities, as the roads already open were inadequate, and at seasons of the year almost impassable ; that the construction of the road contemplated, "became in the opinion of the court indispensable to the well being of the county ;" and that as it would require an extraordinary expenditure far beyond the available means of the county, to construct such a road, it was in the opinion of the court advisable to aid a private corporation in the construction of said road, and thereupon the proclamation was issued and the question submitted to the voters of the county. The proclamation and all the papers in the case appear to have been prepared with care and accuracy ; and the proceedings appear to have been conducted with especial reference to the Code under which they were authorized. But,

3. It is contended that the proceedings are not authorized by the Code. Section 114 provides that "the county judge may submit to the people of his county at any regular election, or at a special one called for that purpose, the question whether money may be borrowed to aid in the erection of public buildings ; whether the county will construct or aid to construct *any road* or bridge which may call for an extraordinary expenditure." An effort is made to restrict the meaning of the words "*any road*" to common roads, streets and lanes. We can see no good reason for such limitation upon the ordinary use of words. The word "*any*" extends to an indefinite number of roads. It applies to all, and to all kinds, which may require an extraordinary expenditure. An ordinary highway or road requires no such expenditure. Such roads and highways are abundantly provided for by the general road tax upon

persons and property. Code, §§ 567, 568, 569. Under these three sections an ample fund is provided, which may be increased to any extent by a vote of the people ; and a special property tax is also provided for the building of bridges which may be found too expensive for the ordinary road fund.

In the construction of a statute the great object should be to discover the true intention of the legislature. The language of section 114 is precise and free from ambiguity ; consequently no more can be necessary than to apply to the words their natural and ordinary sense. But if any doubt is entertained in relation to the real meaning of the legislature, that doubt must be removed when that section is considered in connection with the other sections of the Code to which we have referred. These sections were prepared by the same commissioners and adopted by the same legislature ; the one under the law defining the powers and duties of county judge—the three sections under the law regulating roads and highways. The latter law is complete within itself. It comprises all necessary legislation upon the subject, and provides all necessary means for the construction of common highways or public roads. The former law in section 114 confers the power upon the county judges to submit to the people the question whether their county shall construct or aid to construct any other road or bridge requiring an extraordinary expenditure. All common roads and bridges, even such as involve large expenditures, are abundantly provided for by chapter 38 of the Code. Section 568 provides that a property tax of three mills on the dollar may be levied, and a higher rate, without limit, may be established by a vote of the people. As all public roads are abundantly provided for without the aid contemplated in section 114, we can see no reason why the provisions of that section should be regarded as applicable to such roads. The legislature clearly did not intend this section for public or county roads, not only because the same provisions and

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means were fully provided for such roads in other sections, but also from the fact that such roads are not under the control of any other being or association. The section provides for "aid to construct," thus referring to such roads as are controlled and managed by other corporations or parties than the county.

Under every rule of construction applicable to this section, whether we take the words themselves in their natural and ordinary sense as the best declaration of the lawgiver's intention; or whether we consider this section in connection with others so as to impart force and harmony to the whole; or whether according to the condition and wants of the county which dictated the policy of the act, the conclusion is fully confirmed in our mind, that the provisions of section 114 are applicable to railroads, and that the court below ruled correctly.

Judgment affirmed.

Dissenting Opinion by KINNEY, J. William Y. Lovell, as county judge for the county of Dubuque, issued his proclamation to the voters of that county, ordering an election to be held, and a vote to be taken upon the following proposition:

"Shall the county of Dubuque assist in building the Dubuque and Pacific railroad, commencing in the city of Dubuque, by taking two hundred thousand dollars stock, for which county bonds will be issued, and an annual tax of five mills on the dollar be levied for the payment of the interest on said bonds, and that after fifteen years that the amount of the tax be increased to the sum of one per cent. on the taxable property of the county, for the purpose of paying the principal and interest of said bonds, until the said bonds and interest be all paid; provided, that it shall be in the power of the county judge to reduce the tax each year, in case the said per cent. should raise more than the amount of principal and interest due in each year, but in no case can the per cent. collected be

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less than sufficient to meet such principal and interest, and provided that should the county judge, at any time deem it for the interest of the county to dispose of its stock at par value, then the above tax to cease from and after the sale. The form of the vote shall be "for the railroad," or "against the railroad." "For the railroad" shall be for the above proposition entire." From this decision of the county court submitting the above proposition, the county by David S. Wilson, Esq., appealed. When the case came into the district court, it was submitted by consent of counsel on the following points: *First*—Whether the county has the constitutional right to assist in the construction of such a railroad within the bounds of the county. *Second*—Whether if such constitutional right exists, the proceedings of said case were regular and in accordance with the Code of Iowa. *Third*—Whether the Code of Iowa authorizes such proceedings and subscription.

After full consideration of the case, the court decided the above proposition in the affirmative, and declared the proceedings of the county court legal and valid. Whereupon the case was appealed to this court, and the following errors are assigned. *First*—The judgment of the district court is against law. *Second*—The exercise of the power of voting a tax for the purpose of subscribing to a railroad company is unconstitutional, illegal and void. *Third*—The code of Iowa confers no power upon the county judge of Dubuque county to submit the question of taking stock by the county in a railroad to a popular vote.

These assignments embraced substantially the propositions submitted to the district court, and by that court decided in the affirmative.

By a majority decision of this court, that judgment is affirmed: from this decision I must respectfully dissent; and will examine the propositions submitted to, and decided by the court below and this court.

Can the legislature constitutionally pass a law author-

izing the counties to vote a tax for the purpose of constructing railroads, and have a majority of the electors the right by their votes to tax a minority against their consent? It is claimed that there is such a law: this I deny, and will in the proper place establish my position. But first as to the constitutional question here presented. Taxation is an arbitrary power. It is a high prerogative. It is an element of sovereignty. It can only be levied by express law or the will of the monarch. It is based upon public necessity, and proceeds upon the ground that it is essential to the public welfare and safety. It should only be resorted to when required for this purpose. Unless confined within its legitimate sphere, it will become despotic and subversive of those liberties which it was ordained to protect. It is insidious, and demands constant watching, or under the assumed name of public good, general prosperity, &c., it will invade and destroy the rights of the people. It is that power which the mother country attempted to exercise over the infant colonies, and which met with such a signal rebuke from the stern men of those days, who taught the world that they knew well how to discriminate between the rightful and oppressive exercise of this power; and it well becomes our government to prevent its exercise for any other purposes than support, defense and security. It is a rule necessary to the existence of society that many of our natural rights must be surrendered for the public good. In exchange for these we obtain protection to life and liberty, security in acquiring, possessing and enjoying property.

Members of this society are bound to contribute their proportion of the expense in sustaining an organization which affords these great blessings. For the great object of protection, national, state, county and city organizations are established. With a wise national constitution, clearly defining the rights of the several states, and planting important landmarks in the cause of civil and religious liberty, with our state constitution embracing principles

applicable to the situation, and promotive of the happiness of the people: these constitute the foundation of organized society, and here has the citizen a right to look, to ascertain the extent of the rights yielded and acquired by his membership. Here he finds that the object of government is to take from him only such natural rights as are inconsistent with the enjoyment of civil liberty, and to demand by way of taxation only so much as is necessary for the support of that government. He also finds in the state constitution a power delegated to the legislature to create political and municipal corporations: hence counties and cities are organized for the sole purpose of rendering the enjoyments of life, liberty and property more perfect and complete. Now as a member of the government what taxes is he compelled to pay? He must assist in the support of the national and state governments, because these make and execute the laws which afford protection. He must bear his share in the necessary county expenses, because this organization is but a refined branch of the government, placing life, liberty and property upon a more secure and permanent basis, and bringing protection more perfectly within his reach. This then is the object of government, and its support, the only cause for which the citizen can legitimately be taxed. But it is said that a majority must rule, and a man as a member of the county organization is subject to the rule of the majority. This in many respects is true, but it is liable to very many exceptions. If a majority say that a man shall suffer death, is it any reason why that punishment should be inflicted? If a majority say that he shall be imprisoned in the penitentiary, is it any argument in favor of a deprivation of liberty? If a majority say that a man's property shall be taken from him and given to another, does this afford a reason for stripping him of his possessions? Not at all; and yet we are told that a majority can tax a minority against their consent for purposes entirely foreign to the support of

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government; and if they refuse to pay such tax, lay hold of, and sell their property, and appropriate the proceeds in building railroads. Was this a part of the object of the political association? Was there any express or tacit stipulation on the part of the corporators, when they formed this compact for self-protection, that their property might be taken from them by order of a majority for purposes of private enterprise and speculation? Is there anything to be found in the law organizing these counties from which such a power can be inferred? Is it not a well established principle that no powers can be exercised except those expressly granted? Is it not true that a corporation can only be used to carry out and fulfill the object of its creation? Can it be said when counties were organized solely from public necessity, and to render the rights of the citizen more secure, that they are fulfilling these objects by building railroads, and that these are essential to the public good?

In my opinion a person is not subject to this kind of involuntary taxation. It does not contribute in any way to support the government, nor is it promotive of that welfare and security for which governments were established. To allow a majority by their vote to tax a minority, to build railroads, is repugnant to every principle of civil liberty, and tends directly to despotism. If this doctrine is to obtain, then it is in the power of a bare majority of voters, destitute of property, to saddle a tax upon a minority, the only property holders in the county. How is this power to be kept within reasonable limits? and who is to draw the dividing line between a tax for support and protection, and that which may be said to be for the public good, unless the tax be confined to the legitimate purposes of government? If it may be raised to build railroads, it may with the same propriety be raised to erect manufacturing establishments, to sustain a line of steamboats, keep up a line of stages or telegraphic communication. All of these, in one sense, are quite as necessary to the public

good and convenience as railroads ; and yet who will contend that they can be established and kept in operation by a compulsory tax vote ? And yet such is the inevitable result if the decision of this court is to become the law of the land.

The constitution declares "that all men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property." If this property is to be held by the citizen, subject to the will of the majority, and if by that majority it can be taxed, sold, and appropriated towards building works of internal improvement, where is the enjoyment, possession and protection guarantied by this article of the constitution ? Is a man protected in the possession of his property when public clamor may at any time demand it for what a majority may please to call public purposes ? Do the people of Iowa hold their land by so feeble a tenure ?

But it is said that when private rights come in contact with the rights of the many that the former must yield. This is true when necessary for the purposes of government, or for those public conveniences which are free and accessible to all. It is upon this principle that taxes are levied and property sold to support the government. Upon this principle are public roads laid through our lands, over which the public have a right to pass without loss or hindrance. But as railroads are in no manner connected with the successful administration of government, and as they are mainly owned and controlled by private companies, the benefits of which can only be enjoyed upon such conditions and charges as the corporators may impose, it follows that they do not fall within the principles here laid down, and that private rights should not yield although demanded by a majority. By a wise provision in our constitution the state indebtedness is restricted to the sum of one hundred thousand dollars, unless a proposition for a greater amount be first submitted to the people at a general election and re-

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ceive the approbation of a majority of the qualified electors of the state. This restrictive clause was intended for the purpose of preventing the legislature, in times of great public excitement, from involving the people in those heavy embarrassments for works of internal improvement which had proved ruinous to many of the western states. And yet, while no general election has ever been held for the purpose of deciding this question, the electors of the counties have at special elections voted themselves in debt for railroad purposes more than three millions of dollars. While the force of this provision in the constitution is admitted, it is contended that all the counties of this state may at special elections vote themselves in debt to any amount. In my opinion this would be doing indirectly what the constitution directly forbids. The counties make up the state, and the people, who are obliged to bear the burden of the taxation, are protected by the constitution from such excessive indebtedness, except in the manner pointed out by that instrument. Here may the minority shelter themselves against the taxation sought to be imposed by virtue of special elections.

But again, "the state shall not directly or indirectly become a stock holder in any corporation." § 2, art. 8. It is admitted that the counties voting in favor of a certain amount for railroad purposes, become stockholders to the amount voted for. If it is admitted that one county can become a stockholder in works of internal improvement, it follows as a necessary corollary that every county in this state may do the same. Suppose such should be the result, which appears rather probable from present indications, I ask if the state is not indirectly a stockholder and the spirit of the constitution as clearly violated, as if the state should do directly that which the constitution forbids? It is the duty of the courts to protect and preserve the spirit of the constitution from legislative encroachment, otherwise that solemn instrument which was formed to protect the life, liberty and prosperity of

the citizen, (every principle of which the court should enforce) would be liable to be frittered away, and become a mere rope of sand.

But I have thus far treated the subject as though there was an express law authorizing counties to vote for, and take stock in works of internal improvement. I affirm that not a single adjudged case can be found sustaining corporation tax for this purpose, that has not proceeded upon the ground that there was a clear and unmistakable law authorizing the raising of such a tax. The court below and a majority of this court decided that this law is found in the Code of Iowa. It will be borne in mind that the legislature appointed three commissioners to prepare and report to that body a code of laws, this report they presented at the session commencing in December, 1850. It is claimed that this law exists in § 114 of the Code. That section when reported to the legislature read as follows:

“The county judge may submit to the people of his county at any regular election, or at a special one called for that purpose, the question—whether money may be borrowed to aid the erection of public buildings—whether the county will construct or aid to construct any road or bridge which may call for an extraordinary expenditure,—*whether the county will subscribe to any work of internal improvement.*”

This last clause authorizing the county judge to submit to the people of the county whether they would subscribe to any work of internal improvement, was rejected by the legislature on the ground that it was a violation of the constitution. Hence the clause was stricken out and the other part of the section adopted *verbatim*. See printed Code as reported, p. 6, § 12; also see as passed p. 23, § 114.

The question whether such power should be conferred upon the counties thus came directly before the legislature, and after full and extended discussion was rejected as

unconstitutional and unwise. But it is said that the authority is found in the same section in these words: "Whether the county will construct or aid to construct any road or bridge which may call for an extraordinary expenditure." These words "any road" undoubtedly mean any county road. It is plain to my mind that they do not mean railroad. The persons who drafted the section did not intend to give them any such meaning, or why did they in the very next sentence name works of internal improvement? It is apparent that the legislature did not so construe them, for they refused to pass that part of the section which gave counties the right to subscribe for railroad stock. It is well known to all who are familiar with the proceedings of the legislature of 1850-51, that the body was divided upon this question, one part contending that the counties should be permitted to engage in works of internal improvement, while the other and far more numerous party doubted the constitutionality and policy of such a law. It is also well known that the battle upon this subject was fought over the section of the Code which was stricken out. It was not claimed that the power existed except by virtue of the express provision which the legislature refused to pass. But I hold that the common acceptance of the word "road" will not justify its application to a railroad. As a generic term the word includes highways, streets and lanes, but is generally applied to highways. The words "any road" do not to my mind embrace railroads. When we speak of railroads we use the words, and it takes the adjective and the noun to convey our meaning. A railroad is in no legal sense a public highway or common road. But the Code has laid down certain rules by which words shall be construed. "Words and phrases shall be construed according to the context and approved usage of the language."—§ 26, p. 6. The manner here laid down for the construction of words in the Code is the law, and by it we are bound. All must agree that the word "road," by the approved usage of the

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language, means a public highway, in which all have an equal and common interest. A railroad certainly is not such a road as this, as it is owned by private individuals, and is in all respects private property, subject to execution and sale, and to be laid waste and abandoned at any time. But we are not left to depend upon the definition and common acceptation of the word "road." The legislature has given a legal construction to the word which excludes the possibility of its application to a railroad: "The words 'highway' and 'road' include public bridges, and may be held equivalent to the words county road, common road, and state road." To prevent any misapplication of these words, "any road," and as if to bar the very construction which is now claimed for them, the legislature in clear and positive language confine their application to county roads, state roads, &c. Then it inevitably follows that the county judge cannot submit the question whether counties will subscribe stock to railroads, as no such power lurks under the words "any road." The definition given to these words by the legislature not only upsets such presumption, but it is evident that the friends of county stock never claimed for them such application, as an unsuccessful effort was made before the succeeding and last legislature to obtain a law for the purpose of enabling counties to assist in building railroads. See house journal, p. 218. Therefore, twice, by express vote, the legislature refused to allow the judge the power which it is now claimed was conferred upon him by the Code as it was originally passed. It never was contended, however, that the county judge had any such authority until it was ascertained that a law for this purpose could not be passed.

In this opinion I have established to my satisfaction :
First—That a majority have no inherent or political right to vote a tax subjecting the property of a minority to be seized, sold, and the proceeds appropriated towards building works of internal improvement. That private property is not subject to this kind of depredation, and proceedings

for this purpose are in violation of natural rights, and inconsistent with the genius and policy of our government. *Second*—That the legislature has no right under our constitution to pass a law authorizing counties to raise a tax for building railroads. *Third*—That when properly understood there is no such law, and the power is not conferred upon the county judge to submit the question by the use of the words in the Code “any road.”

In the examination of this question I have endeavored to meet and decide all the points fully and fairly. Not having seen the decision of my brother judges, I have labored under much embarrassment in preparing this opinion. I have not been insensible of the weighty consequences suspended upon the decision of this case. I have endeavored in vain to prevent a decision which I believe erroneous and which must sooner or later be so declared. Counties have voted stock for railroad purposes from fifty to four hundred thousand dollars each with indifference as to payment, which to my mind is most alarming. But few of the counties in comparison to the entire number intrusted have as yet voted, and it is but a fair deduction unless this spirit is soon checked, that the state will not be less than ten million of dollars in debt within the next five years for railroad purposes alone. The interest upon this enormous sum, will not be less than seven hundred thousand dollars per annum, all of which must be raised by direct tax upon the people. In these times of feverish excitement, when the public mind is jostled off from its true balance, when public and private economy as well as natural justice are lost sight of in the clamor for public improvements, would it not be well to pause, to refer back to first principles and reflect upon consequences which involve a sacrifice of constitutional rights, loss of private property, and an utter perversion of county and city organization.

D. S. Wilson and J. Burt, for appellant.

P. Smith, for appellee.

MILBURN v. MARLOW et al.

Where the defendant in an attachment suit files a delivery bond to the satisfaction of the sheriff, for live stock, he is entitled to the possession of such stock without first paying for the keeping of the same while under attachment.

Appeal from Jefferson District Court.

Opinion by WILLIAMS, C. J. This cause originated in the district court of Van Buren county and was removed to Jefferson county by a change of venue. Nathaniel L. Milburn for the use of John D. Baker brought his suit against Benjamin P. Marlow, sheriff of Van Buren county, and his sureties, on his official bond, to recover damages for the non-performance of the condition thereof. The breach complained of, will appear from the following statement: Andrew J. Davis had instituted his action by attachment in the district court of Van Buren county against Milburn. The attachment was levied by Marlow, who is defendant here, as sheriff, on the property of Milburn—among other things, eleven working oxen. The oxen after levy were taken by the sheriff and put to keeping under the care of one Stump. After the taking of the oxen, and before the original suit had been prosecuted to judgment, Milburn availed himself of the provision of the statute, for the release of the property, by filing a delivery bond, with security. The bond was accepted by Marlow, the sheriff, but he refused to release the oxen, and deliver them to Milburn, or Baker, to whom they had been transferred by Milburn until the expenses for the keeping, charged by Stump—being one hundred and fifty dollars—were paid by Milburn.

The defendants appeared and answered the petition of the plaintiff by pleading that the oxen attached were in the possession of Stump, ready to be delivered to him

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whenever he would pay the one hundred and fifty dollars, then due, for the keeping. That he was not in default, officially, by refusing, under the circumstances, to release the oxen; and therefore there was no liability on his official bond. He also set up, as a defense to the action, that Milburn had paid another person for the keeping of one yoke of oxen taken by him by virtue of the same writ of attachment. To this plea of the defendants, the counsel for the plaintiff demurred. The demurrer was overruled, and judgment entered thereon. The plaintiff having appealed to this court, assigns for error, this ruling of the district court.

The only question is, as to the sufficiency of the defendant's answer to the plaintiff's petition. Is it a valid, legal defense to the action? We think it is not.

By the provision of the Code, § 1876, p. 268, "The defendant may, at any time before judgment, discharge the property attached, or any part thereof, by giving bonds with surety, to be approved by the sheriff, in a penalty at least double the value of the property sought to be released, conditioned that such property, or its estimated value, shall be delivered to the sheriff to satisfy any judgment which may be obtained against the defendant in that suit, within twenty days after the rendition thereof. This bond shall be filed with the clerk of the court." In compliance with the requirements of this section, the defendant, in the attachment proceeding, filed his bond, to which no objection was made by the sheriff. The bond having been approved and filed with the clerk it remained there, in the custody of the court, substituted by law for the property which had been attached, to secure any amount which might be recovered by the plaintiff against the defendant, by the judgment of the court, in the principal suit, to which the attachment was auxiliary. The fact of indebtedness, on part of the defendant, to the plaintiff, to any amount, remained unfixed until judgment would be rendered in the principal action. His liability even for any costs of the

suit could not be established until such judgment had been rendered against him. He might be successful in defeating the entire action of the plaintiff. The expense incurred by attaching and keeping the oxen, was legally incidental to the proceeding which had been adopted by the plaintiff against the defendant. The defendant had no control of the matter. He was compelled to submit to the legal acts of the sheriff in execution of the process. Having taken the oxen, by virtue of the attachment, it was the duty of the sheriff to see that they were properly kept while in his custody. A reasonable compensation for such keeping was allowable, and became chargeable as a legitimate item in the bill of costs of the suit ; and as such to abide the judgment of the court therein. A proper construction of the Code above cited, clearly sustains this position. The only duty which it imposes upon the defendant in an attachment, in order to repossess himself of his property when attached, is, that he shall file a bond with sureties with the clerk of the court, which had been approved by the sheriff, before judgment in the principal action. There is no requirement that he shall pay for the care or keeping of the property while out of his possession, under the attachment. That such expense must necessarily be incurred, in almost every instance, where property is taken by attachment, is obvious. Nevertheless the legislature has not made this a condition upon which the property may be released. We have frequently decided that the proceeding by attachment is in derogation of the common law, and cannot be enlarged or extended by implication as to the remedies. Such is the doctrine of the court generally. This is held to be correct in *Moore v. Hamilton*, 2 Gilman, 429 ; and such has been the adjudication of the courts generally. We cannot therefore enlarge the requirements of the Code, by imposing upon the attachment defendant conditions not therein specified.

But this question has been settled by other courts by direct decision on the point. In the case of *Starr v. Taylor*,

3 McLean, 544, the court decided that the sheriff, when he levied on live stock, became liable for its support at the expense of the defendant, but that this expense should be paid on sale of the stock. In the same case, reported in 3 McLean, 356, the court expressly says that the expense of keeping live stock is properly chargeable as costs of the suit. If the defendant in attachment had not released the property by filing his bond with sureties, the expense of supporting the oxen, in the event of a judgment being obtained against him, would, with the sum of money for which that judgment had been rendered, have been made as costs of the suit, by the sale of them. It was to answer to the judgment which might be rendered against defendant, that they were levied on by attachment. The bond, with sureties, for double the value of the property attached, was filed in compliance with the statute, to be answerable in satisfaction of the judgment, if obtained against him, for the debt and costs. If, however, the judgment of the court should be in his favor, then the plaintiff himself, at whose instance the costs had accrued, would be liable for them. In the absence of any statutory provision otherwise, this is the legitimate disposition of this question. Any other would work greater hardship on the attachment defendant than is warranted by the statute, by which only the proceeding is allowable. The sheriff was answerable for the proper and safe keeping of the oxen, and the person in whose keeping they were put is presumed to have taken them in charge subject to this construction of the law. To entitle him to a release and redelivery of the property, all that was required of the attachment defendant was to comply with the statute in filing the bond. This he did, and the oxen should have been returned to him without further condition or detention. The demurrer to defendant's answer should have been sustained.

Judgment reversed.

J. C. Hall, for appellant.

G. G. Wright, for appellee.

REILEY v. WARD.

Where W. agreed to enter forty acres of land for R., in payment for digging a cellar, but neglected to enter the land and refused to pay the money: held that R. was entitled to a mechanics' lien.

A mechanics' lien may be enforced where payment was to be made in land or property.

Appeal from Muscatine District Court.

Opinion by KINNEY, J. Petition by Reiley for a mechanics' lien for excavating four hundred and twenty yards of dirt for the cellar of the dwelling house of Ward. He alleges that there was a contract by which said Ward was to have entered for him forty acres of land. That the land never was entered by said Ward for plaintiff, and that he refused to furnish the money to enter the same. Whereupon he prays a mechanics' lien for the value of the labor. This petition was demurred to, and the following assigned for cause: *First*—That plaintiff gave a merely personal credit to said Ward, and no credit to said land. *Second*—That the plaintiff entered into a special contract for another manner of payment. This demurer was sustained by the court. Plaintiff appeals and contends that this decision is erroneous. § 981, of the Code provides that "every person who by virtue of a contract with the owner of a piece of land performs work, or furnishes material especially for any building, and which material is used in the erection thereof, has a lien" &c.

Under this section the plaintiff filed his petition, and we think he was entitled to his lien. But the court were of the opinion, because he made a special contract with Ward to enter him forty acres of land, therefore he did not give the credit to the house, and could not enforce a lien. In this the court erred. The object of this law is to give mechanics—those who furnish materials and

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laborers—*security* for the amount respectively due them. It can only be by virtue of a contract that the lien will arise.

In that contract the owner may obligate himself to pay in money, land, or any specific article of property. If he does not fulfill by paying in the manner agreed upon, the mechanic is entitled to his lien. We see no distinction in principle between the agreement to pay money or property which could possibly affect the remedy provided by statute. If the labor has been performed, or the materials furnished, no matter in what the owner agreed to pay, if he has not paid, the mechanic or laborer has a right to resort to the security provided by law. A different rule would be unreasonable and unjust. It would be in the power of the owner, providing he could find mechanics willing to contract for property, to defraud them out of their labor, by refusing to pay in the manner required. This would be a perversion of the statute, and defeat the object of the legislature. The demurrer should have been overruled.

Judgment reversed.

J. Butler and *S. Whicher*, for appellant.

W. G. Woodward, for appellee.

STANCHFIELD v. PALMER.

Parties may be regarded as partners in relation to third persons, under facts and circumstances much less conclusive than would be necessary to establish a partnership between themselves.

Upon a demurrer to evidence the testimony is to be taken most strongly against the party who demurs.

A demurrer to evidence not only admits the truth of the testimony, but also the conclusions of fact which may be reasonably inferred from such testimony.

When the possession of property was not acquired wrongfully in an action of replevin, there should be evidence of a demand and refusal; but if the property was illegally taken no demand is necessary.

In an action to replevy saw logs, there should be proof that the identical property had been owned by plaintiff.

Appeal from Scott District Court.

Opinion by GREENE, J. Replevin by Daniel Stanchfield against Robert Palmer for the recovery of one thousand pine saw-logs. All the material allegations in the petition are denied and put in issue by the answer. The entire evidence of plaintiff in the case is before us in two sets of depositions. Defendant demurred to its sufficiency, and the demurrer was sustained by the court.

The testimony shows that the logs in question were sold by one Berry to the defendant, and it is claimed that Berry in this transaction acted as the partner of Stanchfield; and, if the partner, he was authorized to sell the logs. The evidence on this point is too vague and contradictory to show a partnership, or agency *inter se*; but the nature of the transaction, and the positive testimony of Nichols, "that he knew they were partners," might justify a court or jury in so finding the fact as to third persons. This court has already decided that parties may often be adjudged partners as to third persons, when they could not be so regarded as between themselves. *Price v. Alexander*, 2 G. Greene, 427. Circumstances much less conclusive are sufficient to estab-

lish a partnership as to third persons. Collyer on Partnership, 89, 97.

It is justly charged that the evidence elicited from plaintiff's own witnesses conduced to show that Berry acted at least as his agent, if not his partner; and, although that evidence is not very conclusive, still it is of such a character that we should not feel justified in disturbing the judgment of the court below, if that court had been authorized by consent of parties to decide upon this question of fact. But upon a demurrer to evidence, as in this case, the testimony is to be taken most strongly against the party who demurs. He not only admits the truth of the testimony to which he demurs, but also those conclusions of fact which a jury may reasonably and fairly infer from the testimony. *Pauling v. The United States*, 4 Cranch, 219; *Thornton v. Bank of Washington*, 3 Peters, 36. If from any admissible view of the facts the jury would be likely to render a verdict against the party demurring, such should be the judgment of the court. So ambiguous and doubtful is the testimony upon the question of partnership and agency, that the jury might have found against the demurring party, and if this had been the only point in the case, such should have been the decision below.

2. But there are other points upon which the decision of this case must turn. There is no evidence in the case of a demand and refusal. When replevin is in the *detinet*, as in this case, we think a demand on the part of plaintiff, and a refusal by defendant, are necessary. So in every instance where the possession was not wrongfully acquired. The defendant purchased the logs from the apparent owner, and the person in possession. He was an innocent purchaser, and acquired possession in good faith. The testimony clearly shows that there was no unlawful or wrongful act on his part in acquiring the property. In Phillips Ev., C. & H. notes, 225, the doctrine is recognized that when the goods came into defendant's possession by delivery of plaintiff, or of a third person, or by finding, it is necessary, at

least when the defendant merely detains them, to prove that he has refused to deliver them up, upon demand being made by the plaintiff. See also 6 Mod., 212; 6 East. 538; 2 T. R., 376; *Ingalls v. Bulkley*, 13 Ill., 315; 4 Greenleaf, 316; 4 McLean; 3 Scam., 579; 6 Barb., 440; 2 Comstock, 295; 5 Stew. and Port., 383; 2 Mason, 77; 9 Bar. and Adol., 764; 2 Stark. Ev., 839, 842; 2 Sand. R. 47.

From the authorities, the conclusion is clearly this: when the *taking is illegal* no demand is necessary, but when the defendant became lawfully possessed of the goods in the first instance, either by delivery as in the case at bar, or by finding, the plaintiff must prove a demand and refusal before suit in order to recover. As there was no effort to prove a demand in the present case the demurrer was properly sustained.

3. There is another serious hiatus in the testimony before us. We think the plaintiff has signally failed in the proof to identify the logs. The evidence does not show that the logs replevied are those which were sold by Berry to defendant, or that the identical logs replevied had been previously owned by the plaintiff. This failure to show title, or to identify property, was of itself fatal to plaintiff's recovery, and justified the decision below.

Judgment affirmed.

G. C. R. Mitchell and *H. O'Conner*, for appellant.

Cook and *Dillen*, for appellee.

Russell v. Russell.

RUSSELL v. RUSSELL.

In a proceeding for divorce and alimony, the court set apart and decreed to the wife in fee a portion of the husband's land : held that this was not necessary for her maintenance, and should not have been done ; that a lien might have been ordered upon the land to secure the payment of alimony for her support during life.

Alimony is an allowance for the support of a woman legally separated from her husband, and not for a distribution of his estate by force of law.

The amount of alimony should be regulated by the condition of the parties, and the amount of available means owned by the husband.

IN EQUITY. *Appeal from Dubuque District Court.*

Opinion by WILLIAMS, C. J. Application by petition for a divorce from the bonds of matrimony, and for maintenance, filed by Polly Russell against Isaac Russell, and heard at the October term, 1853, of the district court for Dubuque county. The petition is in the usual form. After setting forth the marriage and cohabitation as husband and wife for about thirty years, and that their children had all attained to mature age, excepting one, then about eighteen years old, the petitioner assigns, as the reasons why she should be divorced and be allowed maintenance, that she has always, since their marriage, conducted herself with propriety, and with affection and good faith as the wife of the defendant ; that although at the time of their marriage the defendant was temperate, he had for many years been so addicted to the use of intoxicating liquor, that he had become an habitual drunkard ; that he had become abusive and violent in his treatment of her, insomuch, that her happiness was destroyed, and life endangered by living with him, as his wife. She also avers that by her care and industry she had aided in the maintenance of the family, and the acquirement of the property which is possessed and owned by the said Isaac, her husband. The petition sets forth, in considerable detail, the fact of intemperance

and abuse, of which she complains, and concludes with a prayer for a divorce from the bonds of matrimony and a suitable maintenance out of his estate, of which a description is set forth in the petition.

The respondent appeared, and filed his answer, denying the allegations of intemperance and abuse, on his part. He then proceeds, after averring the due performance of all the marital duties on his part, to charge upon her violence of temper and habitual abuse of him, so that if ever he had in any way abused her, it was to defend himself when assailed by her.

The petition, answer and evidence in the case, all taken together, present a long life scene of family discord and strife, commencing in Ohio, at the earliest period of the recollection of their oldest child, who is a witness in the case, of mature age, and carried on "*crescendo*" until the parties end in Iowa by being docketed in court. The witnesses, who testify in the case, with one or two exceptions, are the children of the parties. The evidence fully sustains both the petition and the answer.

The court below decreed the divorce, as prayed for, from the bonds of matrimony, on the ground "that the parties could not live together in peace and happiness, and that their welfare required a separation. The court, then, being advised of the extent and value of the property of the parties, and the said Isaac Russell desiring that the said Polly be allowed a definite part of said property permanently in preference to a periodical claim on him, decreed that the said Polly Russell have the following land in *fee simple*, to wit: Twenty-two acres off the north part of so much of the east half of the south-west quarter, of section thirty-one, township eighty-eight, range three, east of the fifth principal meridian, as lies east of the traveled road between Dubuque and Andrew, and to be set off so as to include the dwelling house and the spring on said tract; but that the said Isaac have the privilege of access to the water, and the privilege of using the same; and also the privilege

of using the pasture jointly, with her, by putting two horses, two colts, two cows and two calves in the same ; also the north-east quarter of the south-east quarter of section twenty-five, in township eighty-seven, north of range two, east of the fifth principal meridian ; that this decree stand in lieu of a deed of the same from the said Isaac to the said Polly ; and further, that the debts of the said Isaac, which were owing by him on the first day of the present term, and the costs of this suit be paid out of the personal property of said Isaac, and the remainder of same be equally divided between plaintiff and defendant ; and it was further ordered that Jonathan Higgins be, and he is appointed a commissioner to set off the land," &c.

From this decree of maintenance the respondent, Isaac Russell, has appealed to this court. Three objections are urged to the decree of the district court.

1. The alimony allowed to the complainant by the district court, is unreasonable, in consideration of the estate possessed by the appellant.

2. The district court allowed and decreed, to the complainant an estate in fee simple, in the lands of defendant, which were decreed to her ; whereas a life estate only should have been allowed to her, as maintenance.

3. The decree is against law and equity.

There being no question raised here, as to that part of the decree which dissolves the marriage contract of the parties, we will leave that as fixed by the district court, and proceed to the consideration of the decree of alimony.

The prayer of the petition is for a divorce from the bonds of matrimony, and also for alimony. Having decreed the divorce as sought, the court also set off to the petitioner a part of the respondent's real estate in fee simple. This we think should not be done. It was not necessary to her maintenance, that the title to the estate of the respondent or any part of it should be transferred from him to her. The courts, in such cases may encum-

ber the real estate of the husband by creating a lien on it for the maintenance of the wife when divorced to secure it against his default by refusing, or neglecting to pay the alimony decreed, but the rights of realty are held in too much regard to be disturbed by a procedure so summary. The estate as to inheritance, would thereby be diverted from its legitimate direction. The only duty which the court had to perform, was that of decreeing alimony for the support of the petitioner, during her life, out of the estate of her husband, this to be done with due consideration of the available means of which he was possessed, and of her condition in life. *Lawrence v. Lawrence*, 3 Paige, C. R., 267.

Alimony is an allowance for maintenance of the wife. It is not to be understood as involving a distribution of the estate by force of law. 4 Bouvier, 279-80.

It is a reasonable charge for maintenance of the wife, which the law will enforce against the husband, when he refuses to support her, or when she is separated from him by his default. It will be enforced against the husband so long as he refuses to support her, or the separation continues; but will cease upon reconciliation and re-union. If the law should be so enforced as upon a prayer for alimony to distribute in fee simple the real estate of the husband between him and the wife, it might tend to promote litigation of this kind, and render the proceedings under the Code for divorce not only an easy mode of shaking off the bonds of matrimony, but an ingenious and fashionable way of acquiring title to real estate and changing the inheritance thereof. We think that in every view of the case it was going too far for the court to divest the husband of the fee simple title to any portion of his land, and transfer it to the wife, for the purpose of giving her alimony. It is only a support of the wife for life. *Wallingford v. Wallingford*, 6 Harris and Johnson, 485-488; *Equity Digest* title alimony: *Jeans v. Jeans*, 2 Harring, 142; *Clark v. Clark*, Watts and Serg. 85.

We find no authority in a case of this kind, for transferring the real estate of the husband, in fee simple, to the wife, independent of the consent of the husband, by the act of a court. The most that will be done judicially, is to give the wife a lien on the real estate of the husband for the amount of alimony decreed. This principle is held in *Frakes v. Brown*, 2 Blackf. 295: *Questel v. Questel*, Wright, 492.

In reviewing this case upon the question of alimony, we have endeavored by proper means to ascertain the condition of the parties, the amount and value of the property possessed by the respondent, which may be available in adjusting the question before us, so as to afford the parties a support, and at least some comfort in separation, of which there was no hope while living together with their habits. The decree of the district court is set aside, and the following will be entered as the decree of this court in the case, viz :

That the bonds existing between said Isaac Russell and Polly Russell be dissolved, and this court having considered the matter of the maintenance of the said Polly Russell, and the court being advised of the extent of the property of the parties, and the said Isaac Russell desiring that the said Polly Russell be allowed a definite part of said property in preference to a periodical claim on the said Isaac Russell ; it is therefore considered, ordered, and decreed by this court, that the said Polly Russell continue to hold in her own right the north-east quarter of the north-east quarter of section one, in township eighty-seven, north of range two east, being the said land entered in her own name. And it is further ordered and decreed by the court, that the said Polly Russell have the following described land during her natural life, to wit : twenty-two acres off of the north part of so much of the east half of the south-west quarter of section 31, township 88, north of range three east of the fifth principal meridian, as lies east of the traveled road between Dubuque and Andrew, and to be set off so as to include the dwelling

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house and the spring on said tract ; but that the said Isaac Russell shall have the privilege of access to the water and using the same, and the privilege of using the pasture jointly with her by putting two horses and two colts, two cows and two calves in the same ; and that the said Polly Russell have the following described land during her natural life, to wit : the north-east quarter of the south-east quarter of section twenty-five, in township 87, north of range three east of the 5th principal meridian ; and that this decree stand in lieu of a deed of the same from the said Isaac to the said Polly. And it is further decreed and ordered by the court, that said Polly Russell have one half of the household and kitchen furniture. And it is further ordered and decreed by the court, that the debts of said Isaac Russell which were owing by him on the first day of the October term of the district court of Dubuque county in the year 1853, and the costs of this suit, together with the sum of thirty-five dollars which is hereby allowed Lincoln Clark, Esq., as his fee for his services in attending to this suit for the said Polly Russell, be paid out of the personal property (except the household and kitchen furniture) of the said Isaac Russell, and the remainder of the same be divided equally between the said Isaac Russell and the said Polly Russell.

And it is further ordered that Jonathan Higgins be and he is hereby appointed a commissioner to set off said 22 acres, and to put said Polly in possession of the same, and to ascertain such debts and costs ; and when the said debts and costs are ascertained, to sell enough of the personal property (household and kitchen furniture excepted) to pay the same as they become due, and then to divide the remainder equally between the said Isaac and the said Polly, giving to the respective parties such property as he may deem most suitable for them. And it is further ordered that the said Jonathan Higgins make report of his doings thereon and file the same in the office of the clerk of this court.

Decision reversed.

P. Smith and *B. M. Samuels*, for appellant.

L. Clark, for appellee.

COLE v. SWAN.

The pleadings should all be in, and the issue made up, before the jury is sworn.

The officer having a jury in charge should not speak to them while deliberating upon their verdict, except to ask them if they have agreed.

Appeal from Polk District Court.

Opinion by KINNEY, J. Swan sued Cole, claiming one thousand dollars damages for an assault which, he alleged in his petition, Cole committed upon his person. Answer filed, and on the fifth day of the term a jury was empaneled and sworn to try the issue between the parties. The following day plaintiff asked leave to file a replication to the defendant's answer. This was objected to by defendant, but the court overruled the objection, and permitted the replication to be filed. To this ruling the defendant excepted. This was error in the court. The pleadings should all be in, and the issue made up before the jury is sworn. The jury was sworn to try the issue; but if a different issue is made after the oath is administered, and the jury permitted to try that issue, as was the case in this instance, it is clear that they are trying a different issue, from the one they were selected and sworn to try. Such a practice would lead to the greatest possible confusion and injustice.

By the Code, all allegations in the pleadings not responded to are to be taken as true. Hence all new matter set up in the answer of the defendant, as it was not replied to by the plaintiff, the party had a right to insist, before the jury, was confessed. But the court by permitting the replication to be filed after the jury were sworn, deprived the defendant of that advantage, changed the issue, and made up a different one on the pleadings, than the case on trial. The jury returned a verdict for the plaintiff; where-

upon the defendant filed a motion in arrest of judgment and for a new trial.

Among other reasons assigned for a new trial is this : "Beconde, the deputy sheriff and bailiff, informed the jury that they would be kept by the court from Saturday evening until Monday morning without anything to eat, unless they would agree upon their verdict ; and that in consequence of this, one of the jury consented that a verdict might be returned."

The facts contained in this part of the motion are fully sustained by the affidavit of the deputy sheriff and two of the jurors. § 1810 of the Code permits affidavits of jurors to be used in support of a motion for a new trial. The court very improperly overruled this motion. Officers having a jury in charge while they are deliberating upon their verdict should never speak to them, except to ask them whether they have agreed. Any conversation by the officer ought to subject him to severe punishment by the court ; and any verdict returned after such conversation, whether it had any influence or not in producing the verdict, ought to be set aside the moment the fact comes to the knowledge of the court. Although a juror might swear that in making up his verdict he was uninfluenced by the remarks made by the officer, yet he may be mistaken. It is the right of the party to have a verdict which is the result of an uninterrupted and unprejudiced deliberation.

The court erred in overruling the motion in arrest of judgment, and for a new trial.

Judgment reversed and trial *de novo* awarded.

Casady and *Tidwick*, for appellant.

Bates and *Jewett*, for appellee.

Roberts v. McMahan.

ROBERTS v. McMAHAN.

Where R. undertook to advance sufficient money to satisfy two judgments against M., and as security for such advance and twenty per cent. interest, it was arranged that R. should bid off the land under execution in his own name, and receive the rents therefrom, and when the rents received amounted to more than enough, to refund the money advanced and twenty per cent. interest: held that the transaction shows an intention to create and secure an indebtedness from R. to M., and that the sheriff's deed to R. should be regarded as a mortgage which was satisfied by the rents collected. Oral evidence not admissible to contradict or vary a written instrument, but under the exception to this rule, it may be shown by extraneous proof that a deed, absolute on its face, was intended as a mortgage.

IN EQUITY. *Appeal from Des Moines District Court.*

Opinion by GREENE, J. Bill to set aside an execution sale. From the pleadings and evidence in the case, we regard the following facts as proved: In October, 1840, John Hargrave and wife, for the use of David Hendershot, recovered a judgment against the complainant, McMahan, for \$110 16; and in October, 1841, Amos Ladd recovered a judgment against him for \$116 62. In May, 1844, lot 364 in the city of Burlington was sold to Roberts to pay the judgment in favor of Ladd. Prior to the sale there was an agreement between McMahan and Roberts by which Roberts undertook to advance sufficient money to satisfy the Ladd and Hendershot judgments, and to take the title to the lot as security for the money advanced, and twenty per cent. interest. Roberts was to have immediate possession of the land and receive the rents and profits. In consideration of this agreement and the undertaking of Roberts to pay off both judgments, Hendershot, who stood ready to pay the amount of both judgments for the lots, was prevailed upon not to bid. After the sale, Roberts requested delay in the payment of the Hendershot judgment until he obtained the sheriff's deed. But after

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obtaining the deed, he refused to pay the judgment, and refused to execute writings to McMahan to deed the lot on his payment of the money advanced. The rents and profits received by Roberts amounted to more than he had advanced in the purchase of the lot. On this state of facts the court below found for complainant; and the defendant now seeks to reverse the decree.

On a careful examination of the bill, answer and depositions, we can discover no good reason for disturbing the decree.

The entire transaction shows an intention to create and secure a debt from McMahan to Roberts. The purchase was made in Roberts' name, for the purpose of securing the debt. The deed under this contract amounted to nothing more than a mortgage. Roberts, as mortgagee and as trustee of McMahan, received full payment of his debts in the rents and profits collected by him from the mortgaged premises.

It is true, as insisted, that if we were to follow the deed alone in this case, we could not otherwise regard the transaction than as a *bona fide* sale. And it is equally true, as a general rule, that oral evidence is not admissible to contradict, vary or add to a written instrument. But in equity there are exceptions to this rule. To declare that to be a sale, which was really intended as a mortgage, is in equity a fraud so repugnant that it cannot be sanctioned under the most imposing and formal deeds of conveyance. To expose this fraud, and to advise the court of the true character of the contract, and the real intention of the parties, extraneous evidence is clearly admissible, both upon principle and authority.

The authorities upon this point are numerous. *Conway v. Alexander*, 7 Cranch., 238; *Prince v. Bearden*, 1 A. K. Marsh., 170; *Oldham v. Halley*, 2 J. J. Marsh., 112; *Whitlick v. Kane*, 1 Paige, 202; *Taylor v. Luther*, 2 Sumner, 232; *Flagg v. Mann*, *ib.*, 538; 2 Halsted, 102; 6 Gill and John., 275; 15 Conn., 575; *Wright v. Bates*, 13

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Verm., 341; *Strong v. Glasgow*, 2 Mur., 289; *Russell v. Southard*, 12 Howard, 139.

The refusal of Roberts to pay off the Hendershot judgment, and to give McMahan an obligation to re-deed the lot agreeable to contract, and his avowed determination to convert that into an absolute sale which was intended by the parties to be nothing more than a security for a loan, were obviously fraudulent acts, which in equity justified the admission of oral evidence; and indeed rendered it necessary, in order to show the true state of the transaction.

We think the evidence in the case amply proves the facts as we have stated them, and shows further that the consideration paid by Roberts was grossly inadequate—not one-fifth of the real value. This gives weight to the conclusion that the relation of debtor and creditor was alone contemplated by the parties.

Decree affirmed.

M. D. Browning, for appellant.

J. C. Hall and *H. W. Starr*, for appellee.

HAWLEY v. WARDE.

Where the payee was entitled to a mechanics' lien on a promissory note, he does not waive or forfeit his lien by endorsing the note and leaving it for a time with a third party as collateral or otherwise, unless it appear that he actually transferred all right to the note.

A mere attempt to negotiate a note on which a lien might be established does not amount to a waiver of such lien.

Appeal from Muscatine District Court.

Opinion by WILLIAMS, C. J. Cyrus Hawley instituted his action against J. C. B. Warde for \$624 91, and claimed

that for this amount he was entitled to judgment, and also a mechanics' lien by virtue of the provision of the Code, p. 154, § 981, which is as follows :

"Every person who by virtue of a contract with the owner of a piece of land, performs work or furnishes material for any building, and which material is used in the erection or reparation thereof, has a lien upon the lands, including the building with its appurtenances, for the amount due him for work or material, against all persons except incumbrancers by judgment rendered, and by instrument recorded, before the commencement of the work or the furnishing of the material."

Plaintiff obtained judgment in the district court for \$624 91, the sum claimed as due to him from the defendant. The court however decided that he was not entitled to a mechanics' lien for more than \$324 91. For this amount a lien was allowed under the statute, as prayed for, on lots one and two in block forty in the city of Muscatine, with the house for the building of which the materials had been furnished. The cause was tried at the May term, 1853. The plaintiff appeals from the decision of the district court refusing to adjudge him a mechanics' lien for the whole amount of the indebtedness found in his favor.

The bill of exceptions presents but one question upon the ruling of the court below. The facts and the judgment in the case appear in the bill of exceptions, and are as follows : "The trial by jury being waived by the parties, and the cause submitted to the court, the following facts of testimony in the case are found : 'That the plaintiff, under written contract with defendant, agreed to furnish a large quantity of bricks to be used in the erection of the house described in plaintiff's petition, which were of the value of \$724 91 ; that the sum of \$50 00 had been paid to plaintiff, leaving a balance of \$674 91 ; that defendant Warde had executed his promissory note to plaintiff for the sum of \$350, and that the plaintiff endorsed this note in blank, and left it with the house of Hatch & Co., with whom he dealt ;

that receipts were passed between Warde and plaintiff; that after the note had been in the hands of Hatch for two or three days, the plaintiff, upon consultation with his attorney, took up the note from Hatch and carried it back to Warde, to whom it was delivered, and who then gave back a receipt to plaintiff, and also a note for seven thousand bricks, and expressed his desire that the claim of plaintiff should operate as a mechanics' lien upon his house.'"

Thereupon the court below decreed that "although the taking of the note for the work and labor done, or materials furnished for the erection of the house, would not of itself be a waiver of the mechanics' lien, the negotiation of that note, or an attempt to do so by endorsing it and throwing it into the money market, though he should fail for want of purchasers, would amount to such waiver. The intention to abandon the security given by the law is as complete as if he had succeeded in finding buyers, and the waiver is complete." The court also decided that as plaintiff had thus parted with his lien, he could not by any agreement between him and the defendant revive it. The error assigned here is as to this ruling of the district court.

We find two objections to the adjudication of this case by the district court as presented by the bill of exceptions. In the first place the facts of the endorsement of the note and leaving it with Hatch & Co., do not show that Hawley had parted with it by actually negotiating it. The bill of exceptions shows that it had been "*left* with Hatch & Co., for two or three days with a blank endorsement on it," and then taken back, and returned to Warde, and a receipt taken, &c. It does not appear from the evidence what was the purpose for which the note was left with Hatch & Co., but it is manifest that it was not actually disposed of, so as to pass from the ownership or control of Hawley, and that he returned it to Warde who lifted it, and thereby left Hawley to his lien on the original contract. To give this the effect of a complete and legal transfer of the note so as to visit the consequences thereof

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on the plaintiff, by taking from him the benefit of his lien, was, we think, not justifiable. It was at most nothing more than an attempt to render the note available for some purpose—what that was, does not appear in evidence. For aught we know it might have been temporarily deposited to operate collaterally in some business transaction with Hatch & Co. But it is enough that the evidence shows that he did not actually part with it.

Also, we think, that the court below went too far, when it held that a mere *attempt* to negotiate a note which had been given upon a contract for materials used in the erection of a building, operated as a waiver of the right of the party to a mechanics' lien. The court have held that when the contracting party takes other and different security for his debt, or when he transfers the debt for any consideration to another person, the lien given by the statute will be lost. We are not informed of any decision made heretofore, which has gone so far as to declare the lien waived by a mere offer or attempt to negotiate or part with a note of this kind.

This doctrine is sustained by *Graham v. Holt*, 4 B. Monroe, 61, cited in 2 U. S. Equity Digest, 232, § 25.

There is therefore error in the judgment. It is ordered that plaintiff have a mechanics' lien on the property described in his petition for the sum of \$674 91 and costs, as prayed for in the petition.

Judgment reversed.

S. Whicher, for appellant.

W. G. Woodward and *H. O'Conner*, for appellee.

Jones v. Benton.

JONES v. BENTON.

The compensation of a school fund commissioner, under the Code, § 1174, was allowed by the clerk, sheriff and attorney, at five hundred dollars per annum, but the superintendent of public instruction refused to approve the allowance for more than four hundred dollars per annum : held that the superintendent was authorised thus to limit and define his approval of the allowance.

Appeal from Jefferson District Court.

Opinion by KINNEY, J. This was an amicable suit entered into by the plaintiff as school fund commissioner of Jefferson county, and the defendant as superintendent of public instruction for the state of Iowa. It appears that the plaintiff was school fund commissioner for the county of Jefferson for the years 1851 and 1852. He was allowed \$500 00 salary for each year, by the clerk of the district court, sheriff and prosecuting attorney. Each of these allowances was affirmed by the superintendent, with a reduction of one hundred dollars for each year. The county officers refused to assent to the reduction, and the superintendent refused to affirm the whole amount allowed. The question submitted to the court below was, whether Jones was entitled to receive the two hundred dollars, so reduced by the superintendent from the amount allowed by the county officers. The court decided that he was not entitled to this amount, and gave judgment against him. From that he appeals to this court, and contends that the allowance so made by the clerk, prosecuting attorney and sheriff, was a reasonable allowance ; that said superintendent has no right, by law, to reduce the salary so fixed, but that his authority only extends to *approving* or *disapproving* the allowance so made. The decision of this question depends upon the construction to be given to section 1174 of the Code.

"The fund commissioners, from and after the first day of April, 1851, shall receive such annual compensation for their services and contingent expenses for books, postage and stationery, as may be allowed by the clerk of the district court, sheriff and prosecuting attorney, and approved by the superintendent of public instruction, to be paid out of the school fund."

Has the superintendent, under this section, the power to *approve* so much of said allowance as he shall deem reasonable, and disapprove the balance; or must he approve it as an entirety, or reject it as such? If the latter construction prevails, then it would be in the power of the superintendent, and it would be his duty, in case the allowance was too much, to reject the same unconditionally, which would have the effect to keep the fund commissioners out of an amount to which they might be justly entitled. If, in the case before us, the superintendent had disallowed the whole amount, what remedy would or could the commissioner have? Certainly none by *mandamus*, if the position assumed be correct; because the superintendent had acted, and, as counsel contend, acted according to law. Suppose he allowed the whole, then he was but a mere machine to approve what others had done, without exercising any discretion or judgment of his own. If the construction contended for by plaintiff be correct, then the superintendent *must* either *reject* or *approve* the whole. By doing the former, he necessarily becomes the unwilling instrument in the hands of the law, in preventing the commissioner from obtaining any pay, when in his opinion the allowance is too much; and in doing the latter, he but adopts, without any discretion of his own, the action of the county officers. It seems to us that such was not the intention of the legislature. The superintendent is the guardian of the school fund. In him is confided the common school interests of the state. He is supposed to be well acquainted with the affairs of the subordinate school officers, and what would be a reasonable compensation to each fund commissioner. The ac-

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tion of the county officers for this purpose is *advisory*; they agree upon the allowance, and report to him. It is then for him to allow so much of this amount as in his opinion will be a proper compensation. The amount thus approved, whether concurred in by the county officers or not, is the amount to which the fund commissioner is entitled. This is what we understand to be the meaning of the word "approved" in the section of the Code cited, and the authority conferred upon the superintendent.

Judgment affirmed.

William Penn Clark, for appellant.

Slagle and Acheson, for appellee.

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NICHOLS v. BURLINGTON AND LOUISA COUNTY PLANK ROAD CO.

The notice provided by the Code not a "process," and need not be in the style of "the State of Iowa."

When the notice informs defendant that the petition is to be filed "in the office of the clerk of the district court of Des Moines county," it sufficiently designates the court before which the proceeding is commenced.

Where a party subscribed to the stock of a plank road upon other conditions than those named in the articles of incorporation, and subsequently paid five per cent., which was accepted by the company: held that the transaction shows concurrence in those new conditions and creates mutuality.

Under the articles of incorporation, the Burlington and Louisa county plank road company was authorised to commence business and call for installment on stock as soon as five thousand dollars was subscribed.

A general notice to stockholders is sufficient notice to those who subscribed conditionally.

Appeal from Des Moines District Court.

Opinion by GREENE, J. This suit was commenced by the Burlington and Louisa County Plank Road Company

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against Josiah Nichols for installments due on a subscription of three shares to the stock of the company. The defendant answered that the stock was conditionally subscribed by him, and that the condition had not been performed. Upon this fact issue was joined, and the court found for the plaintiff.

1. It is objected that the court refused to dismiss the proceedings on the ground of defective notice. The first defect urged is that the notice does not run in the name of the state of Iowa, as required by the constitution. This court has decided in former cases that the notice provided by the Code is not a "process," as contemplated by the constitution, and that it need not be in "the style" of "the State of Iowa."

The second defect urged is that "the notice is too indefinite as to what court he is cited to attend." The notice informs defendant that the petition was to be filed "in the office of the clerk of the district court of Des Moines county." This we think was sufficiently descriptive of the court.

2. It is urged that the subscription was made upon other conditions than those named in the articles of incorporation, and that therefore the subscription was invalid for want of mutuality. But it appears that five per cent. was paid by Nichols and accepted by the company. This shows a sufficient concurrence in those new conditions, to create mutuality.

3. It is claimed that as the capital stock of the company is fixed by the articles at \$60,000, assessments could not be made, nor installments demanded, till the whole amount was subscribed. If there was any such restriction in the articles, either expressed or implied, the proposition would be correct; but on the contrary they clearly contemplate the commencement of business as soon as five thousand dollars in stock is subscribed. After the \$5,000 was subscribed they had a right to call for installments in the manner pointed out by the articles of incorporation.

4. It is assumed that as the subscription was accompanied

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with a special condition that the amount subscribed should be expended upon a particular portion of the work, that a general notice to stockholders, such as the articles required, would not be sufficient in Nichols' case, unless it stated that the money was wanted for the specific object stated in his conditions.

This conditional subscription did not require any change in the articles of incorporation in giving notice of installments required. It merely required the amount to be expended in a particular way, and hence the usual notice is all that could be required.

The evidence in the case shows that the amount expended by the company in the manner required by the conditional subscription greatly exceeded the amount paid by conditional subscribers. This showed that the company were complying with those conditions, and were entitled to the installments due on the stock subscribed. It was not necessary that the company should set apart the specific funds from the conditional stock for the performance of the conditions. It was only necessary for them to expend the amount in the way required, and not necessary to expend the identical money received on conditional stock in that way. Surely the defendant has no right to object that the company first advanced their own money for the improvement he required, before calling upon him to pay for the stock he had subscribed for that object. Upon this and all other points in the case we think the court below ruled correctly.

Judgment affirmed.

M. D. Browning, for appellant.

J. C. Hall and *T. D. Crocker*, for appellee.

Armstrong v. Pierson.

ARMSTRONG v. PIERSON.

In an action of right, the plaintiff cannot recover unless he shows that the grantor, in the deed to him had title.

In an action of right or ejectment, the plaintiff must rely on the strength of his own title.

Appeal from Des Moines District Court.

Opinion by WILLIAMS, C. J. John Pierson commenced his action of right against B. C. Armstrong in the district court of Desmoines county, for the recovery of the possession of lots number twenty-eight, (28) twenty-nine, (29) thirty, (30) thirty-one, (31) thirty-two, (32) and thirty-three, (33) all in Peasley's addition to the city of Burlington, in said county. He claimed fee simple title thereto, in himself. He also claimed damages for the detention, use and occupation thereof, one thousand dollars.

The defendant, Armstrong, appeared and filed his answer, denying plaintiff's right to the possession of the lots, and denied that the plaintiff was the owner of the lots in fee simple; and also denied that he was entitled to damages for the use, occupancy and detention thereof. He also averred in his answer that he had and held the possession of the lots in question, by virtue of a title bond executed by the plaintiff to him, for the lots on a purchase thereof, which bond was made and dated on the 18th day of June, 1851, under which he went into possession of the premises and made valuable improvements thereon. He further averred in his answer that the plaintiff having a judgment in said court against him, the defendant caused an execution thereon to be issued, and levied on said premises as the property of said defendant, by virtue of which the said lots were sold by the sheriff of said county; and being so sold were purchased, as the

property of defendant, by plaintiff; that from the time of said sale the defendant had one year to redeem said lots, and that the time of redemption had not then expired, and therefore no title by virtue of said sale was vested in the plaintiff to said lots; that plaintiff was thereby estopped, &c. The plaintiff filed his replication denying the answer of the defendant. The cause by consent was submitted to the court without the intervention of a jury upon the issue joined. The court found the issue for the plaintiff, and judgment was accordingly entered. The title to the lots in question was decided to be in the plaintiff, with the costs of suit to be paid by defendant. A bill of exceptions to the proceedings was taken by defendant, and an appeal to this court.

By the bill of exceptions it appears that the only evidence which was offered by the plaintiff to sustain the issue on his part was the deed of conveyance made, executed and recorded by Francis J. C. Peasley and Mary E. Peasley his wife, to John Pierson, senior, for the lots in dispute, dated May 1, 1851, acknowledged the same day, and recorded May 3, 1851, in deed book No. 16, page 111. Here the plaintiff rested his cause. The defendant gave no evidence on his part. Thereupon the judgment of the court was entered for the plaintiff.

This judgment must be reversed. The answer of the defendant, in the most direct terms, denied the title of the plaintiff to the lots in dispute. He stood secure, in his possession of the premises, until the plaintiff, by proof of a good title, showed his right thereto. After proving the purchase of the lots, by himself, from Peasley and wife, it was necessary to show a good legal title to them in Peasley and wife, as vendors, under whom he claimed by deed. If the title of Peasley and wife was defective in law, so was his, being derived from them. He should have shown a good title in himself by legal derivation from the government, as the source. It has been so often decided that, in an action of ejectment and right, for the recovery of the

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possession of real estate, the plaintiff must rely on a good title in himself, and not on the weakness of the title of a defendant who is in possession, that we deem it superfluous to adduce authorities on the subject. As we find nothing in the pleadings which defeats the right of the defendant to the benefit of this principle of law, and as it disposes of the whole case, it is unnecessary to discuss any other points presented by the issues. As the case stands, judgment should have been for the defendant.

Judgment reversed.

J. C. Hall and D. Rorer, for appellant.

Starr and Phelps, for appellee.

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CREAL v. CITY OF KEOKUK.

The city of Keokuk is authorised by its charter to establish and regulate the grade of streets.

A city authorised to establish and regulate the grade of streets, is not liable for damages growing out of the proper exercise of that authority.

The power to regulate the grade of streets comprises the power to change the grade, without incurring liability for the prudent exercise of that power.

Appeal from Lee District Court.

Opinion by KENNEY, J. The plaintiff filed his petition, claiming three hundred dollars damages for being compelled to raise his brick store house, in block twenty-eight, in the city of Keokuk, in order to suit the grade of Main street, as established by the city council. He alleges that he was subjected to the above damages in consequence of a change in the grade made by the city after he had built his store house, and by which he was governed in the erection

of said building. To this the defendant answered that the city was not liable to pay any damages that the plaintiff indirectly or consequentially sustained by reason of the establishment of any grade on Main street, or any change of the same. The city denies all plaintiff's allegations, claims the power to make proper grades of the streets, or make discreet changes of the same, to suit the public good or convenience, and this without liability. If any grade has been established or changed, as alleged, defendant insists that the same was done under the charter of the city of Keokuk, and by virtue of the action of the city council of said city, all in pursuance of the authority delegated in said charter. The defendant denies all liability, and contends that the power to establish and regulate grades has been clearly delegated and prudently exercised. To this answer the plaintiff demurred for the following cause: That the defendant, by law, is liable for damages which are the natural and usual consequences of establishing a grade of the street, and also for changing an established grade.

This demurrer was overruled by the court below. This it is contended by the plaintiff is error.

The questions presented by the record were argued at length, and with much ability. Most of the cities in Iowa, on the Mississippi river, being deeply interested in the result of this decision, its importance has been fully felt by the court, the case has been held under advisement, and the authorities examined with much care. Two questions are raised.

1. Is the city liable for damages in consequence of establishing and grading in a skillful and prudent manner the streets.

2. For changing a grade once established.

The city of Keokuk is a municipal corporation. The legislature has given it a charter containing certain powers. If that act of the legislature is constitutional, (and this is not doubted,) it has a right to exercise, in a proper way, all the powers contained in the charter. Being created by

law, and possessing only such powers as are conferred, its acts must be confined within the limits prescribed by the authority which gave it existence. Beyond these it cannot go, but may exhaust all the power which has been bestowed.

If in the attempt to exercise its corporate rights, it has exceeded the power delegated, or exercised what it rightfully possessed in an imprudent and unskillful manner, it is liable for all damages which have been occasioned by such assumed or improper exercise of power. To ascertain its authority to grade, we must look into the charter, § 22. "The city council shall have exclusive power to *establish* and *regulate* the grade of wharves, streets and banks along the Mississippi river within the corporate limits of said city." Here then we find the power to establish the grade. When exercised to the damage of a citizen, is there a corresponding liability to pay these damages? Not according to the English authorities, and state decisions from the most respectable courts of this country. A city corporation is made absolutely necessary in consequence of a large number of persons congregating to do business at a particular point. Those general laws which afforded ample protection when they were scattered over a large scope of country, are not sufficient when they are thrown in closer proximity. The strong can more easily oppress the weak, the vile corrupt the virtuous, and the villain prey upon the honest and unsuspecting. New interests spring up, commerce requires protection, business points must be made accessible, population increases, and hence there arises a *necessity* for another subdivision of government, for which a charter is obtained and a city incorporated. All the citizens alike are partners in this new organization, and each must contribute a proper proportion of the expense to carry it on.

All have consented to the terms or stipulations of the articles of incorporation, (the charter,) and each citizen has yielded up so many of his natural rights as are inconsistent

with this their organic law. For this he secures additional protection, new facilities for transacting business, and increased value of property, which is the natural consequence. Every man who afterward becomes a citizen of the place, becomes a member of the corporation and consents to the provisions and powers, as well as the liabilities, contained in the charter. One of these express provisions authorizes the city or common council (which is but the citizens in their representative capacity) to establish the grade of the streets in the city. This was agreed to by the parties to the compact, and considered essential to the enjoyment of property and advancement and prosperity of the city. Did they agree that they would pay all damage which might accrue in consequence of the exercise of this power? Was this a condition attached to the act of incorporation? Not at all. If the power then exists without restriction or liability, none can now be attached. If their own law has not provided a remedy where are we to look for one? There is none in statute, none at common law, except in form *ex delicto*. There is no complaint that the city has *tortiously* established the grade, but on the contrary the demurrer admits it was done by virtue of the charter in a prudent manner.

It being for the mutual benefit of all that this power should exist and be incorporated into the charter, and the grading of the streets being necessary for the convenience of all, every man surrendered for his own good all objection to the prudent exercise of this power. But the city must act cautiously and skillfully in making her grades or the charter will afford no protection, for if the city abuses its powers, or uses them for other purposes than those expressly designed, she cannot shelter herself behind her charter, but is liable the same as an individual who proceeds without authority. In the case of *Callender v. Marsh*, 1 Pick. 418, Parker, Ch. J., says in relation to the surveyor of the city of Boston: "It is his duty to see that the road is made passable, safe and convenient, and this he is obliged to do

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by filling up low places and reducing hills, in which duty he must act with discretion, for he acts at his peril. If the public safety and convenience require a leveling of the road, he must do it with as much care in relation to property bordering on the road as it is possible for him to use, and if he shall abuse his authority by digging down and raising up where it might not be necessary for the reasonable repair and amendment of the road, he would be amenable to any suffering party for his damages." We adopt this language of the Chief Justice as entirely applicable to the principle involved in this case, to wit: that the liability only exists when the power shall be incautiously exercised. This is the doctrine of the books. See the above case in full; also 1 Chitty's Pleading, 77; *Sutton v. Clark*, 6 Taunt., 28; *British Plate Manufacturing Company v. Meredith*, 4 Deva., 789; *Harris & Williams v. Mayor Knoxville*, 1 Hump. 403; *Wilson v. Mayor New York*, 1 Dana, 595; 4 Sergeant & Watts, 444; 9 *ib.*, 382; *St. Louis v. Genno*, 12 Mo., 414; *Taylor v. St. Louis*, 14 Mo., 20; 14 Conn., 146.

These authorities show conclusively that the city of Keokuk is not liable for consequential damages for grading her streets, if the work is performed with skill and prudence. Chief Justice Parsons says in the well considered case of *Callender v. Marsh*, that streets when rightfully laid out are to be considered as purchased by the public of him who owned the soil, and by the purchaser the right is acquired of doing every thing with the soil over which the passage goes which may render it safe and convenient; and he who sells may claim damages, not only on account of the value of the land taken, but for the diminution of the value of the adjoining lots, calculating upon the future probable reduction or elevation of the street or road. And all this is a proper subject for the inquiry of those who are authorized to lay out, or of a jury, if a party should demand one. And he who purchases lots so situated for the purpose of building upon them is bound to consider the contingencies which

may belong to them. Therefore when Creal purchased his lot, he bought subject to the power to grade, and was supposed to count the chances of the damages which might result from grading.

But it is said that the city has no right to alter the grade without paying all damages which may be sustained by such alteration. Upon this question we have had some difficulty. Not that there seems to be any difference in principle in any of the authorities between grading and changing the grade after it is established, but there seems to be an unreasonableness and an apparent injustice in permitting a city after she has fixed the grade, and invited persons to build to it as fixed, to re-grade greatly to the damage of those who have been governed by it, without requiring the city to pay such damage. We were in hopes that we could from the authorities lay down a rule which would compel the city to pay damages consequent upon re-grading. But it is lamentably true that in nearly every state in the Union, where this question has been adjudicated, there seems to be no distinction upon the question of damages between grading and re-grading. If the question was *res integra*, or if the great weight of authority were not to the contrary, and we were now called upon for the first time in our state to settle the law, we should unhesitatingly decide in favor of compensation. But we must yield to the authorities, unjust as we believe the doctrine to be. The charter gives the city the power to establish and *regulate* the grade. It seems to be well settled that the power to re-grade is as absolute as the power to grade. Pennsylvania, Massachusetts, New York, Connecticut, Tennessee, and Missouri, have all decided this question in favor of the construction contended for by the city. In *Matter of Fannon Street*, 17 Wend., 668, chief justice Bronson says the authority to regulate, level and pave streets is a continuing power, or one which does not cease the moment it is executed. It was given for the purpose of promoting the

public safety and convenience, and although the power should never be exercised copiously or upon light circumstances, yet there is no doubt that the corporation may change the level of any street even after it has been paved or otherwise prepared for public use. Chief justice Parsons says those who purchase house lots bordering on streets are supposed to calculate the chances of such elevations and reductions as the increasing population of the city may require. In *Taylor v. Corporation of Georgetown*, 6 Wheat., 593, the supreme court of the United States decide that the power given to the corporation of Georgetown by the act of Maryland, 1796, to graduate the streets of that city is a continuing power, and the corporation may from time to time alter the graduation so made. We are also cited to the case of *Hoffman v. City of St. Louis*, in manuscript. The plaintiff built a valuable house in the city to correspond with the grade as then established. A second grade was made and the property seriously damaged. The court decided that the power to regulate existed, and that the city was not liable for re-grading or changing the grade, and that the same principle applied to re-grading as to grading.

We find no case strictly in point opposed to these numerous authorities except those referred to by counsel for appellant found in the Ohio reports. They stand almost or quite alone, and although we believe them right according to our views of justice, still they are not sustained by the British or American authorities. We have not time, neither is it necessary, to review them. While we may admire the independence of the supreme court of that state, we cannot adopt her decisions when so many courts, for which we have as much respect, hold a different doctrine.

Judgment affirmed.

Reeves and Miller, for appellant.

J. M. Love and J. W. Rankin, for the city.

WIEHELM et al. v. MERTZ et al.

Where the title to land was in the wife before coverture, a lease executed by the husband alone cannot affect her rights after a divorce, Unless a lease has been acknowledged and recorded according to law, it is valid only between the parties thereto and such as have *actual* notice thereof. Actual notice can only be given by express information or personal service.

Error to Des Moines District Court.

Opinion by GREENE, J. FRANCIS, Peter and Bernhart Mertz, commenced an action of right against Jacob Wihelm and Range. Plea, general issue. Verdict and judgment for plaintiffs.

Upon the trial, plaintiffs offered in evidence a deed from Ann Wigginton conveying the lot in controversy to Lyman Cook and John Prugh, dated Nov. 16, 1849, and a deed from said Cook and Prugh dated December 13, 1849, conveying the lot to the plaintiffs.

The defendants offered in evidence a lease purporting to be from Ann and David Wigginton to Peter Lindemuth for the term of three years from October 1, 1848. Lease executed July 29, 1848, and assigned by Lindemuth to the defendants, August 11, 1848. It is conceded that the lease was not signed by Ann. Plaintiff then proved that after the execution of the lease, and before the deed was executed by Ann Wigginton to Cook and Prugh, he and her husband David were divorced by decree of the district court. It was conceded that Ann had fee simple title to the lot when the lease and deed were executed, and although there was no evidence to prove that the lease was executed by or known to Ann, still there was evidence tending to prove that she received rent. The only questions involved grow out of the instructions to the jury.

1. The court instructed the jury that a lease from Wigginton alone binds the wife only so long as the coverture

Wilhelm v. Mertz.

existed, and would not bind her after the divorce, unless in some way ratified by her. This instruction is claimed to be erroneous, but we can see nothing in it calculated to mislead the jury. The lot having been Ann's before coverture, it clearly follows that a lease executed by the husband alone could not effect her right to the property, subsequent to the divorce, without her consent. If he alone could give a lease for three years, he could for twenty or for ninety-nine years, and thus convert his right by courtesy into an absolute control. It is obvious that he could not by lease create a greater tenancy than that which he himself enjoyed. That tenancy could only continue while he remained the husband of Ann. When that relation was dissolved, whether by death or by divorce, his interest in the estate was extinguished, and so was the interest of those who held under him.

2. The following instruction given is also objected to by plaintiff in error: "That to enable defendant to rely on the lease it must have been acknowledged and recorded, as required by the law of conveyances, before Cook and Prugh purchased, or else *actual notice* of the lease to them must be proved." The court also instructed the jury that mere rumor or knowledge that a lease did exist is not evidence of a knowledge of its contents. To this and the other instructions given upon this point, we can see no legal objection. The law in force, when the lease in question was executed, expressly declares that "no such instrument in writing is valid, except between the parties thereto, and such as have *actual notice* thereof, until the same shall be deposited with the recorder for record." Rev. Stat. p. 209, § 31. Under this statute mere constructive notice is not sufficient. The possession of defendants, and the other circumstances given in evidence conducing to prove notice, would have been sufficient to establish constructive notice. If nothing more than notice was required by our statute, the authorities cited by counsel would have been relevant and conclusive. But not so

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where *actual notice* is required. This court ruled in *Hopping v. Burnam*, 2 G. Greene, 39, that "*actual notice* can only be communicated by express information to, or personal service upon the party interested in the notice." We consider no notice actually made to a party, which does not come up to this rule.

Judgment affirmed.

J. C. Hull, for plaintiff in error.

M. D. Browning, for defendant.

 FREDERICK v. REMKING.

Where the maker of a note promised to pay a stated sum in cabinet furniture at his shop, under a contract in writing that the cash prices at the date of the note should govern, and where the note was assigned after it became due : held that the contract was a part of the transaction, and that it was not necessary for the maker to set apart the furniture, and that a demand and refusal were necessary before suit upon the note as a money demand.

Appeal from Polk District Court.

Opinion by KINNEY, J. Action brought and petition filed upon the following note :

\$244 75. For value received, I promise to pay J. E. Jewett, or bearer, two hundred and forty-four dollars and seventy-five cents, in cabinet furniture, at my shop in Fort Des Moines, Iowa.

C. D. REMKING.

Iowa, May 11, 1852.

Assigned, March 1, 1853, to B. F. Frederick.

Answer denies any demand for the furniture at the shop, denies any demand of payment, alleges readiness and abil-

ity to pay according to the tenor and effect of the note ; that defendant has ever been ready and willing to pay whenever a demand was made ; that he repeatedly requested Jewett, when the note was in his possession, to take the furniture away, as the same was ready ; and as soon as he learned that the plaintiff had the note, informed him that the furniture was ready, and requested him to take the same away. Sets up a special agreement between defendant and Jewett in relation to the price, &c., of the furniture, of which the defendant had full knowledge at the time the note was assigned to him.

Plaintiff replies, that if the defendant had the furniture ready, he did not tender or set apart the same for the payment of said note. This appears to have been the issue tried below.

Was it necessary for the defendant to set apart the furniture, to prevent the note becoming a cash demand ; or should the plaintiff have made a demand at the shop, where the note was payable, before he could bring suit for the money ? The court instructed the jury that it was not necessary for the defendant to set apart the furniture, and that a specific demand by the plaintiff, or his agent, was necessary, before he could bring suit upon the note as a monied demand.

In view of the tenor of the note, and state of the pleadings, we think the court are right. By the special agreement between Remking and Jewett, entered into at the time the note was executed, it appears that they had been in partnership in the cabinet-making business ; that they dissolved, and that this note was given for Jewett's share of the furniture, "*to be paid in furniture at the present cash prices, whether furniture should, or should not raise or fall in value.*" This contract formed a part of the transaction, bears even date with the note, the note is particularly described, and in giving it construction, it is proper for the court to examine this contract with a view of ascertaining the *intention* of the parties.

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Whether Frederick had notice of the existence of this contract or not, is not material, if it was a part of the same transaction with the giving of the note, and if the note was assigned to him after it was due. That it was a part of the same transaction is admitted by the state of the pleadings. The replication only denies that the plaintiff had *knowledge* of its existence. The note, it will be seen, is not payable at any given day. It was virtually due on the day of its execution. But was it the intention of the parties that it should be paid on that day? We think not; or else why did they agree that if the price of furniture should fluctuate, Remking should receive the price it bore at that time. This was an unnecessary stipulation if the note was to be paid *presently*. And as parties are not supposed to insert vain and idle provisions in their contracts, they must all, if possible, be construed as meaning something. This can only mean that the parties are providing for the payment of this note in *futuro*, at no fixed or certain day, but at such reasonable time as the party payee might call for it. If such be the case, § 959 of the Code must dispose of the question: "No contract for labor, or for the payment or delivery of property, (other than money) in which the time of performance is not fixed, can be converted into a money demand, until a demand of performance has been made, and the maker refuses, or a reasonable time is allowed for performance."

This section of the Code would probably apply independent of the agreement, as the time of performance is not fixed by the terms of this note, (although at common law it would be due *instanter*,) but taking it in connection with the agreement, there can be no reasonable doubt but that a demand and refusal were necessary, before the note become a money demand.

Judgment affirmed.

J. E. Jewett, for appellant.

Casady and Tidrick, for appellee.

Barker v. Brink.

BARKER v. BRINK.

Where a note payable in property or labor, fixes the time of performance, no demand is necessary.

If the indorsement of a property note shows the plaintiff to be the holder when suit is commenced it is sufficient.

Appeal from Jones District Court.

Opinion by GREENE, J. An action on a promissory note promising "thirty-five dollars in stock, to be delivered in Hale township on the first day of November next." Note signed by J. S. Brink and Ezra Martin, and made payable to "Asahel Barker or bearer." Assigned by said Barker to A. Chaplin, and subsequently re-assigned by Chaplin to Barker.

On the trial, plaintiff offered the note in evidence and rested. Defendant then moved for a nonsuit on the ground that plaintiff had not proved a demand, and because the indorsement on the note did not show it to be the property of the plaintiff at the time it fell due. The motion was sustained, and the plaintiff nonsuited.

This ruling is erroneous. Had there been no time fixed for the performance, or payment of the note, a demand would have been necessary under the Code, § 959. But as the note in this case fixed the time of performance, no demand was necessary.

We can see no objection to the indorsements on the note. They show ownership in the plaintiff at the time suit was commenced. The fact that another may have held the note when it became due, did not preclude the maker from making a tender of the property as authorized by § 960 of the Code.

Judgment reversed.

I. M. Preston, for appellant.

J. P. Cook, for appellee.

TWIFORD v. ALAMAKEE COUNTY.

A county seat may be changed by an authorized vote of the people, even from a location declared by law to be permanent, although land had been deeded to the county to secure such permanent location.

Where a party was induced to deed land to a county in consideration of having the county seat permanently located on or near his land, and if the county seat is subsequently removed by vote of the people, the county should re-convey the land to the party.

Appeal from Alamakee District Court.

Opinion by KINNEY, J. At a district court held at Waukon, in Alamakee county, the plaintiff moved the court to adjourn from that place to the town of Columbus, for the reason, as alleged in the motion, that it was the only true and legal county seat of Alamakee county. In support of this motion a large amount of record evidence was offered which it is unnecessary to notice, to obtain a distinct view of the case. The court overruled the motion. Plaintiff appeals. It is now contended that there was a contract between T. B. Twiford, as the proprietor of the town of Columbus, where the county seat was first located, and the commissioners of the county, by which Twiford, in consideration of what he had done as proprietor, acquired a vested right which, by virtue of his contract, secured to him the county seat permanently at the town of Columbus. That an act re-locating the county seat was an invasion of this right, and if permitted would impair the obligation of the contract between him and the county commissioners. In support of this proposition we are referred to the act entitled "an act to locate the county seat of Alamakee county." It provides that "the point securing the highest number of votes shall be and remain the permanent seat of justice of said county of Alamakee; *providing* that the owner or owners of such town or point shall, within ten days after the result of said election has been declared, make and

Twiford v. Alamakee County.

execute to the board of county commissioners of said county a satisfactory and sufficient deed for at least two acres of land in said town or at said point, for the use and accommodation of the public building of said county."

In pursuance of this act the county seat was located at Columbus, and the plaintiff, as proprietor, executed to the county commissioners, for the county, a deed to the land required in the proviso to the act.

By an act approved January 24, 1853, entitled "an act to re-locate the county seat of Alamakee county," commissioners were appointed, a point selected called Waukon, which in pursuance of the act was voted for; and having secured a majority of the votes it was contended, and so decided by the court below, to be the county seat of Alamakee county.

In this decision there is no error. Counties are corporate bodies. The people of a particular county are, for some purposes, sovereign and independent. It is for a majority of the voters to say where their county seat shall be, and when it shall be changed. They select the point with reference to their convenience for transacting county business. It is not a matter in which the state, as such, or the people of any other county, have any interest. It is true an act of the legislature is necessary as a preliminary step, but this the legislature will always pass, when applied for by a majority of the voters of the county, either for the purpose of locating or changing the county seat. If, by the terms of that act, they declare any particular point that may be selected the *permanent* seat of justice for the county, it does not follow that they take from the people the right to a re-location, provided a majority feel themselves discommoded by the point selected. One legislature cannot in this way tie up a subsequent one. If the succeeding legislature pass a law authorizing a vote for a re-location, they have a perfect right to do it, although the previous one declared that the county seat should be *permanent*, and *forever remain* at

the place selected. All such acts must be subject to the will and voice of the people.

The location or removal of a seat of justice is an internal arrangement, a question of public policy, over which the people of a county have the exclusive control. But it is said that the plaintiff entered into a contract with the commissioners by which he deeded certain land, and the commissioners undertook, in behalf of the county in pursuance of the act of location, to stipulate that Columbus should remain the permanent seat of justice. When the plaintiff made his contract he must have known (for all are presumed to know the law,) that the legislature had no right to declare the place selected to be and forever remain the permanent county seat; and also that the commissioners had no power to enter into any such contract; that the question was an open question, and the subject of removal liable to be agitated at any moment. We are therefore led to the conclusion, in this case, that although in terms the county seat of Alamakee county was permanently located at Columbus upon condition that the proprietor of the town should deed to the county certain lands, and although such deed was executed and delivered, still said proprietor cannot claim, as a vested right, that the county seat should forever remain at that place, nor can the people of the county be deprived of the right to change the county seat by vote in the manner prescribed by law. Upon such removal, however, the county should re-convey the land which it obtained from the plaintiff.

Judgment affirmed.

B. M. Samuels, for appellant.

J. Burt, for appellee.

Johnson v. Patten.

JOHNSON v. PATTEN.

Where a party sells rails and receives payment, but fails to furnish or deliver them, he is liable to the vender for their value.

A book of accounts admissible as conducing to prove a payment for rails that were not furnished.

Appeal from Henry District Court.

Opinion by GREENE, J. Johnson commenced suit against Patten on a promissory note made to Cochrane and by him assigned to the plaintiff after due. On the trial defendant introduced as a set off an account against Cochrane, the payee, in which there is an item of 620 rails at \$2 50 per hundred—\$15 50. In support of this item, defendant introduced evidence to show that Cochrane had purchased a piece of timber land jointly with one Hoskins; that in making a division, Cochrane took that portion which had the least timber, and that the rails in question were made on Hoskins' portion, with the understanding that Cochrane should have the rails and take them away when he pleased. Subsequently Patten bought Cochrane's portion of the land and also the rails that were on Hoskins' half. Cochrane moved away and Hoskins then forbid Patten taking the rails, and finally sold them with his land, so that Patten never got them. Patten then charged the rails to Cochrane in his account book and introduced it as evidence in support of this item of set off. Plaintiff objected to the introduction of the account book for this object, but the court overruled the objection. It appears that there were other items in the account book and other evidence besides the book, of the demand for the rails. There is no objection made as to the circumstances under which the book was admitted in evidence. But it is objected that the transaction in relation to the rails was not a subject of book account, as they were connected with and became a part of the contract for the sale of land.

Although Patten purchased land of Cochrane at the same time that he purchased the rails, it does not follow that the rails were inseparably connected with the real estate transaction, in which title could only pass by a deed of conveyance. The two purchases were distinct. The title to the one was perfected by the deed ; but the right to the other could only be acquired by delivery and possession. The rails were upon the land and in the possession of another. When Cochrane sold them, a guaranty was implied that upon demand, the rails would be given up to Patten. But when the demand was made the rails were refused, and they were soon after sold and given up to another. As Cochrane failed to place Patten in possession of the rails, he was liable to him for their value, and they thereupon became a legitimate item of account. The proposition is simple and the conclusion obvious. C. sold the rails to P., and received the money for them ; but he failed to furnish them ; he was therefore liable for their value. The rails had never been delivered to P. They were in the possession of H., and he refused to give them up. P. was under no obligation to subject himself to an action of trespass by going on the premises of H. to take forcible possession of the rails. We think therefore that the court did not err in admitting the book of accounts as conducing to prove this item.

Judgment affirmed.

A. Hall and D. P. Palmer, for appellants.

J. C. Hall, for appellee.

Johnson v. The State.

JOHNSON v. THE STATE.

The testimony of one accomplice not sufficient to corroborate the testimony of another accomplice.

A prisoner should not be found guilty on the testimony of two accomplices unless confirmed by some other testimony.

Error to Dubuque District Court.

Opinion by KINNEY, J. Indictment for larceny and conviction.

On the trial Price, an accomplice, testified in behalf of the state. In confirmation of this testimony, his wife who was *particeps criminis*, also gave testimony upon which Johnson was convicted. The ruling of the court permitting the testimony of the accomplice to be corroborated by the wife, and refusing a new trial, are assigned for error.

In the case of *Ray v. The State*, 1, G. Greene, 316, this court decided that a conviction could not take place upon the uncorroborated testimony of an accomplice. This we believe to be the settled doctrine of the books. Can one accomplice be corroborated by an other accomplice? If so, then upon the testimony of *accomplices*, uncorroborated, persons can be convicted. It is just as necessary that the corroborating witness should be strengthened and confirmed, as that the principal one should be, and however abundant this kind of testimony, the accomplice first called is still uncorroborated, and his testimony entitled to no credit. The law regards accomplices in cases of felony when called to testify, as impeached witnesses, and hence their testimony is of no effect, unless confirmed by other testimony. As one impeached witness cannot support the testimony of a witness previously impeached, it follows that one accomplice cannot be a witness to corroborate the testimony of an other accomplice in the same crime.

Wheeler v. Abbott.

That Mrs. Price was equally guilty with her husband, we think is clearly established by her own statements under oath. She was present when Hunt, Arnold, Johnson and Price agreed to go to Paisley's for the purpose of robbing him. She participated in the conversation. She was present when they returned with their felonious booty, and when the money was divided, received herself the share which fell to her husband, and concealed it for safe keeping. Persons so destitute of moral character as both these witnesses, would not hesitate, if actuated by feeling or interest, to add the crime of perjury to acknowledged guilt. The law ever suspicious of testimony so foul, from a source so corrupt, has wisely said that it requires confirmation to entitle it to credit and belief. Johnson having been convicted upon such testimony, the judgment cannot stand.

Judgment reversed.

P. Smith and O. F. Stevens, for plaintiff in error.

D. S. Wilson, for the state.

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WHIPPLE v. ABBOTT.

Where A. gave W. an order on E. for apple trees, and E. refused to honor the order : held that the order would not become a money demand against A., the drawer, without a demand and refusal as provided by the Code, §359.

Appeal from Louisa District Court.

Opinion by GREENE, J. Suit commenced by Charles H. Abbott against E. C. Whipple, on an order drawn by said Whipple on Geo. A. Ellsworth for "ten hundred and sev-

Whipple v. Abbott.

enty-two apple trees." The order was presented at the nursery of Ellsworth, the drawee, for payment, in July, 1852, and payment refused. Upon the trial this fact was proved, and the execution of the order admitted. This being all the proof adduced by plaintiff, the defendant demurred to the evidence, and moved for a non-suit on the ground that there was no demand of payment made to the maker of the order, and no notice of non-acceptance and non-payment by the drawee. The court overruled the demurrer and motion, and rendered judgment against Whipple.

The only question to be decided is: Was a demand upon the maker of the order necessary before it could be sued on as a money demand?

By the Code, § 959, "no contract for labor, or for the payment or delivery of property—other than money,—in which the time of performance is not fixed, can be converted into a money demand, until a demand of performance has been made, and the maker refuses, or a reasonable time is allowed for performance."

The contract, or order, in this case does not fix the time of performance. Before suit could be brought for the value of the trees in money, a demand was necessary upon the maker. The drawee was not the maker; he was not a party to the contract; and consequently a demand of him was not a compliance with the above section. The fact that the order was presented to the drawee, and payment refused, does not deprive the maker of his right to pay the order in trees, unless a demand had been made upon him, and performance neglected. The drawee having had that number of trees in his hands subject to the order of the maker, and having refused payment, the maker's claim was converted into a money demand against him. But this circumstance alone did not change the liability of the maker to the payee. Upon the failure of the drawee, the maker was liable for the specific payment of the order, and its specific character

could not be converted into a money liability against him without the demand required by law.

Judgment reversed.

Jacob Butler, for appellant.

Cloud and O'Connor, for appellee.

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BELL v. HALL.

B. claimed title under a mortgage, dated April, 1841, and duly recorded; decree of foreclosure in May, 1842; sale in October following, and sheriff's deed executed and filed for record October 27, 1843. H. claimed title under a judgment obtained October 7th, 1843, sheriff's deed to R. and J. executed and recorded in March, 1844, and in July, 1846, deed from R. and J. to H.: held that the delay in executing the sheriff's deed to B. could not prejudice his title, and that the deed to B. related back to the sale, decree and mortgage, and secured to him the title over H.

Appeal from Lee District Court.

Opinion by KINNEY, J. Petition by Bell against Hall, claiming possession and ownership of lot three hundred and forty-two in the town of Fort Madison, and also damages for the detention thereof. Plea denying the right of plaintiff to the lot. Trial had; verdict and judgment for defendant. A bill of exceptions was taken by the plaintiff, embodying all the evidence offered by the plaintiff and defendant.

By this evidence it seems that both parties claim title to the lot under one Braxton W Gillock; the plaintiff, by virtue of a mortgage deed, executed to him by Gillock on the 7th day of April, 1841, containing covenants of warranty and possession in Bell. Recorded May 8th, 1841. May 25th,

Bell v. Hall.

1842, a decree of foreclosure in the district court of Lee county, under which there was a sale, October 1st, 1842. October 27th, 1843, a deed was executed by the sheriff to Bell, who was the purchaser under the sale, which was recorded same day. This is the evidence relied upon by plaintiff to establish the title in him. The defendant claims title to the lot by virtue of a judgment and mechanics' lien, obtained by Wilson & Irvin against Gillock, October 7th, 1843. Execution issued, October 20th, 1843; levy, October 24th, 1843; the same lot sold to Reid and Johnson, November 25th, 1843; deed executed by sheriff to them, acknowledged and recorded, March 4th, 1844; deed from R. and J. to Hall, the defendant, March 12th, 1846, and recorded July 7th, 1846.

It will be seen that the judgment and mechanics' lien, under which Hall claims title, was obtained long subsequent to the mortgage, decree, and sale of the lot to Bell, but before Bell got the deed from the sheriff, and put it upon record; and the question is, as his deed was not upon record at the time of the judgment and the mechanics' lien, will the sale upon the latter hold the lot? We think not. The question in this case is not whether a purchaser at a sheriff's sale will hold the property in preference to a prior purchaser, with an unrecorded deed; but, will the purchaser under a subsequent judgment—after a deed has been executed and recorded upon a prior sale—hold the property against such prior purchaser, with an unrecorded deed at the time the second judgment is rendered? Clearly not; especially when taken in connection with all the facts in this case. Bell's mortgage deed was upon record. The conditions became forfeited. He instituted his suit in chancery to foreclose Gillock's equity of redemption. This mortgage, when recorded, was notice to the world. The proceedings in chancery, sale, sheriff's return of the execution, satisfied by sale of the lot to Bell, were all notice to *creditors*. By the law, as it then existed, the clerk of the district court was required to provide and keep a well

bound book in his office, in which he was obliged to enter in alphabetical order all judgments and decrees rendered in the court, the names of the parties, the date, the nature of the judgments and decrees, the amount of the debt, damages and costs, with a blank column or columns for entering a note or memorandum of the satisfaction or other disposition thereof; and when any judgment or decree was satisfied by execution or otherwise, the clerk was required to enter a memorandum thereof in the column left for that purpose, showing how disposed of, and the date, book and page where the evidence thereof was recorded; and such docket, the statute provided, might be searched by any person, at all reasonable times, without fee. Laws of 1839, p. 376, § 28. Here, then, could Wilson and Irvin look, at the time they obtained their judgment, to ascertain what had been done upon the decree of foreclosure. They found in the recorder's office that the lot was mortgaged to Bell; they found in the clerk's office that that mortgage had been foreclosed by a decree; and one step further would have disclosed the *record evidence* which the clerk was compelled to keep of the satisfaction of that decree by the sale of the identical lot to Bell. And all this was matter of public record before their judgment was obtained. Then they are not innocent judgment creditors without notice. *Lis pendens*, in a court of chancery, has always been held to be notice. 1 John. Ch. R. 576; *Jackson v. Dickinson*, 15 John. 315.

Reid and Johnson are not innocent purchasers without notice, for the deed was executed to Bell and recorded before the sale of the lot to them, and hence they could not take anything by that sale. Bell could not be injured by the sheriff's neglect in this case.

In the case of *Jackson v. Raymond*, 1 John. Cases, 85, it is stated as a general principle, that whenever it is intended to be shown that nothing passed by a grant, by reason that at the time there was a possession in another adverse to the grantor, the time to which the grant is to

Bell v. Hall.

relate, is the time when the bargain or contract for the sale and purchase of the land was finally concluded between the grantor and grantee; and consequently any intermediate adverse possession before the execution of the conveyance, which is the technical consummation of evidence of grant, can never affect it. The above is quoted by the court in the case of *Jackson v. Dickinson*, 15 John., 315, and the court say: "If this principle is correct, it applies with equal or greater force to the commencement of a suit in chancery between the time of a sheriff's sale, when the purchase is actually made, and the giving of the deed by him.. In such case, the delay in not delivering the deed is an omission of duty in the public officer, and *his laches ought not to prejudice the rights of the party.*" We adopt the principle here laid down as entirely applicable to the case before us. Wilson and Irvin had notice by the pendency of the proceeding to foreclose; the record evidence in the clerk's office of the sale of the lot to Bell was notice of the sale to him. But if this was not so, according to the authority in *Jackson v. Raymond*, and *Jackson v. Dickinson*, Bell would still hold the lot under the doctrine of relation, as the sheriff's deed, when executed, would relate back to the day of sale and cut off all intermediate judgment creditors. The court erred in deciding the law of the case in favor of the defendant below. Judgment reversed, and a judgment in favor of the plaintiff in this court, in pursuance of the agreement of the parties in the court below. Nothing is claimed by the defendant upon argument because this judgment was on mechanic's lien. It is not pretended that such lien was established.

J. C. Hall, for appellant.

H. T. Reid and *L. R. Reeves*, for appellee.

STONE V. McMAHAN.

The certificate of purchase or duplicate receipt of the treasurer of the Des Moines river board of public works is made *prima facie* evidence of title under the Code.

Appeal from Polk District Court.

Opinion by GREENE, J. An action of forcible entry and detainer. Under the pleadings, the only question involved, was that of title to the land. The plaintiff, James Stone, introduced the duplicate receipt of George Gillespie, treasurer of the board of public works, for the Des Moines river improvement, showing that the land was entered in his name, at the Des Moines river land office. Upon this evidence plaintiff moved for a non-suit, which was granted.

As the case is presented, the only question to be decided is, does the duplicate receipt amount to *prima facie* evidence of title. By the Code, § 2435, the usual duplicate receipt of the receiver of any land offices, is made proof of title equivalent to a patent, against all but the holder of an actual patent. This section abstractly considered, might be deemed applicable only to the land offices of the United States. But by the laws of 1847 p. 168, § 26, the treasurer of the Des Moines river improvement is made receiver, and the secretary register of the Des Moines river land office, and this act provides that "in the discharge of their duties as register and receiver, they shall be governed by the laws and rules prescribed by congress for the sale of lands in this state." Although this act was subsequently amended still these features were in force at the time the duplicate receipt in question was given, and hence it would come under the rule of evidence established by § 2435 of the Code.

The office for the sale of the Des Moines river lands is

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established by a public law, and all acts or evidences of title authorized by that law should be recognized by our courts *ex-officio*.

As the duplicate receipt in this case showed title in plaintiff and as this was the only point in issue, the court should have overruled the motion for a non-suit.

Judgment reversed.

Wm. Penn Clarke, for appellant.

Oasady and Tidrick, for appellee.

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Where the record shows that the requisite number of grand jurors had been empaneled and sworn, and where there was a plea in abatement and demurrer to the bill on the ground that it was found and presented by a less number than fifteen : held that it was not error to overrule such plea and demurrer.

Error to Jefferson District Court.

Opinion by KINNEY, J. Indictment for assault with intent to commit a bodily injury. Plea in abatement, and demurrer interposed on the ground that one of the grand jurors before the indictment was found and presented, was taken sick and died, and that the bill was found and presented by fourteen grand jurors. This plea and demurrer were overruled by the court. Hall sues out his writ, and assigns this ruling for error. This was an effort to attack the power of the grand jury to find the indictment by testimony *aliunde*. It is not alleged in the plea or demurrer that the record disclosed the fact that the bill was found by a less number than fifteen.

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If from the record it appeared that the requisite number had been empaneled and sworn it must be conclusive. If that number had been decreased, it could only be shown by the record. The demurrer to the plea in abatement expressly negatives that the record discloses any such fact. In the case of *Norris' House v. The State*, it appeared affirmatively upon the record that the requisite number of grand jurors were not in session at the time the indictment was found and presented. This was admitted by the pleadings. This case then, is entirely different from that one which is cited by counsel. It would be a most dangerous practice to permit the defendant to impeach by his plea, and oral testimony, a record, which has been so often decided to be absolute verity. It cannot be assailed in the way attempted by the defendant. The court below decided correctly. There does not appear to have been any direct decision upon the demurrer filed by the prosecuting attorney to the plea in abatement, but merely an entry that the plea is overruled. By this we suppose that the demurrer was sustained.

Judgment affirmed.

Slagle and Acheson, for plaintiff in error.

Caleb Baldwin, for the state.

STEWART v. MARSHALL.

A motion to set aside a sheriff's sale was filed in the district court during vacation and over fifteen months after the sale: held that the motion was made too late, and should have been overruled.

Appeal from Lee District Court.

Opinion by GREENE, J. Motion by Marshall to set aside sheriff's sale. Motion granted by the district court. This ruling is now assigned as error.

By the record it appears that Stewart & Pitman obtained a judgment before a justice of the peace, in August, 1849. After an execution was issued and returned, "no property found," a transcript of the judgment was filed with the clerk of the district court; execution was issued December 4, 1849, and a levy made on lots one and two, in block thirty, in Keokuk, Iowa. On this execution, lot one was sold to Vanorsdall, January 5, 1850, and the purchase money paid. On the same day, Vanorsdall bid four hundred dollars for said lots one and two, on an execution sale from a judgment of his own against Marshall. From this sale the lots were redeemed by Wm. Patterson, within the fifteen months limited by law. But on the other sale a sheriff's deed was executed to Vanorsdall, April 21st, 1851, and afterwards, on the 25th of that month, a motion was made in vacation, on the motion-book of the district court, to set aside the sale. This motion could not properly be noticed by the court, or the parties, until the following September term of the court, and does not appear to have been called up, and argued, till the January term, 1852. Exhibits and affidavits were admitted for and against the motion. The facts established may show good grounds for relief, in equity, where all persons concerned are made parties to the proceeding; and, indeed, good grounds for

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relief at law, if the motion had been made within a reasonable time. Nearly eighteen months had elapsed before the execution defendant gave notice of any objection to the sale, and during that period the property may have been, time and again, transferred from one innocent purchaser to another. After a party has slept so long upon his rights, after the purchase money has been paid and deed executed, after the legal title is vested, beyond redemption, in the purchaser, it would, we think, be a dangerous practice to entertain irregularities in the sale, upon a proceeding so summary and informal as a motion at law.

Other courts have decided that after the purchaser has paid his money and obtained a deed, it is too late for a motion to set aside the sale: 2 McLean, 64; *Blair v. Greenway*, 1 Browne, 218; *Chambers v. Stone*, 9 Ala., 260.

Believing it would be a dangerous precedent to entertain such a motion after the transfer has been perfected, we must reverse the proceedings at bar. If the execution defendant is entitled to relief, he can find it in equity.

Judgment reversed.

J. M. Love and *J. W. Rankin*, for appellant.

S. T. Marshall and *J. C. Hall*, for appellee.

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Foss v. Isett.

The seal of the district court essential to the validity of a writ of attachment.
The want of the seal to a writ of attachment cannot be obviated by amendment.

Appeal from Muscatine District Court.

Opinion by KINNEY, J. Isett sued Foss in attachment. On the first appearance of the defendant he moved to

quash the proceedings in attachment, for the reason among others, that the paper purporting to be a writ was not under seal. Thereupon the plaintiff moved the court to amend, which was granted, and the motion of defendant overruled. This was error. Before the property of the defendant could be seized, it was indispensable that the plaintiff should obtain a writ. A paper issued by the clerk in the form of a writ is no writ, unless it has impressed upon it the seal of the court from whence it issues. Without this seal it is no more for the purpose of a writ than blank paper. Could it be amended? Not at all; for there is nothing to amend. It lacks the essential ingredient of a writ, and is not amendable.

It is the seal—other things being right,—which makes it a writ, gives it force, efficacy and life. The property which had been seized upon this void paper could not be held in custody, upon a writ issued, after it was attached, which would be the case if the seal could be subsequently affixed.

The numerous authorities cited by the counsel for appellee are not applicable to the question presented by this record. Neither are the provisions of the Code, §§ 1758, 1759, broad enough to cover the case. This was not properly an amendment which was proposed. It was the creation of a writ. This could be done, but not so as to operate retrospectively upon any prior proceedings. With the seal it became for the first time a writ, and the party to make it available should proceed upon it *de novo*.

Judgment upon the attachment reversed, but as the attachment is merely auxiliary to the main suit, the judgment against the defendant will not be disturbed.

S. Whicher and J. Buttler, for appellant. .

J. Scott Richman, for appellee.

Hillis v. Ryan.

HILLIS v. RYAN.

Where the court decided that there were two hundred dollars in the hands of H., as school fund commissioner, belonging to R., and where the order of the court was presented to H., with a demand of payment, a refusal on his part would justify a *mandamus*, to compel performance.

Every failing demurrant has a right to plead over, upon such terms as the court may direct. To refuse such right unconditionally is erroneous.

Appeal from Jones District Court.

Opinion by GREENE, J. Ira B. Ryan filed a petition in the court below for a peremptory writ of *mandamus* commanding Samuel E. Hillis, as school fund commissioner, to pay over to him the sum of two hundred dollars, which amount had been adjudged due to Ryan from the school fund at a previous term of court. To this petition defendant demurred, and the demurrer was overruled. The defendant then asked leave to withdraw the demurrer and answer over, but this was refused.

1st. It is objected that the court erred in overruling the demurrer, and thereby deciding that to pay a judgment obtained against the school fund commissioner is a duty resulting from his office. Code, § 2179. It is claimed that an execution and not a *mandamus* would have been the proper process. But the record shows that there was not such a record against Hillis as would authorize the issuing of an execution. The court merely decided that there were two hundred dollars in the hands of Hillis, as school fund commissioner, belonging to Ryan, and directed payment. When this order of court was presented to Hillis, with a demand of payment, a refusal on his part would justify a writ of *mandamus* to compel performance. We think, then, that the court did not err in overruling the demurrer.

2d. But we think the court did err in refusing defendant's application to "plead over." The Code, § 1755, declares

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that "upon the determination of any demurrer, the failing party may amend or plead over, upon such terms as the court deems just," &c. Every failing demurrant has a right to plead over upon complying with the terms and general ruling of the court. But in this case the application was unconditionally refused. The defendant, it is true, could not have contradicted the judgment in his answer, but he might have pleaded payment, or a satisfaction of the order, subsequent to its rendition.

Judgment reversed.

Cloud and O'Connor, for appellants.

I. M. Preston, for appellee.



JOHNSON COUNTY v. PORTER.

A witness is entitled to fees from the county for his attendance in a criminal cause on a preliminary examination before a justice of the peace.

Appeal from Johnson District Court.

Opinion by KINNEY, J. The only question submitted to the district court in this case is this, "was the plaintiff, John Porter, when called as a witness in a criminal cause, on the part of the state, in a preliminary examination before a justice of the peace, entitled to payment of his fees from the county, when the defendant is discharged." The court decided the plaintiff entitled to such fees, and rendered judgment in his favor against the county. "Each witness for attending before the district court, is entitled to \$1 00; Code § 2544. Before a justice of the peace 50 cents. Mileage for actual travel per mile each way,

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five cents." This is the only section upon the subject. There is nothing in this to confine the payment of fees to civil cases. It extends to all cases before a justice of the peace, civil as well as criminal. There is no where to be found in the Code a provision requiring witnesses to be paid only in such cases as may be prosecuted to conviction. As far as their fees are concerned, witnesses are as much entitled to them in those cases when the state fails to convict, as when a conviction takes place—as much entitled to their fees for appearing before a justice of the peace on a preliminary examination, as when they appear in court upon the main trial. The above section of the Code we think sufficiently comprehensive to embrace all witnesses whether in civil, criminal, preliminary or final trials, and to entitle them to the fees therein designated.

Judgment affirmed.

C. Bates, for appellant.

Wm. Penn Clark, for appellee.

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EAST v. PARKS.

All process issued by the clerk of any district court must bear test in the name of sub-clerk: but the signature may be regarded as a part of the test, and where referred to in the test as "witness my hand," &c., it is sufficient without repeating the name in the body of the test.

Appeal from Johnson District Court.

Opinion by GREENE, J. This suit was commenced before a justice of the peace, and was removed to the district court of Clinton county, by writ of error. Venue changed to Johnson district court, where a motion was

made to quash the writ of error, because it was not tested in the name of the clerk, and the motion was sustained.

The only question in the case is, did the court below err in deciding that the writ was not properly tested? The Code, § 1592, declares that "all process issued by the clerk of any district court shall bear date on the day on which it issued, and be tested in the name of the clerk who issued the same, and be under the seal of the court."

Defendant maintains that the writ is not tested in the name of the clerk who issued the same, and was, therefore, properly quashed. The writ is tested as follows:

"Witness *my hand* and the seal of said court, December 30, 1852.

S. H. SAMUELS,

Clerk District Court Clinton county."

It is not pretended that S. H. Samuels was not the clerk, but it is insisted that his name should have been inserted after the word "witness," and preceding the date of the test. It is claimed that the test of a writ is one thing, and the signing of it is another and different thing. But may not the signing become a part, and often the most authentic part of the test? Where the law requires the writ to be tested in some other name than that of the clerk, it would be necessary to insert such name in some portion of the attestation. If in the name of the king it would be "witness ourself." If in the name of the chief justice or presiding judge, his name should follow the word "witness." But where, as in our state, the writ is to be tested in the name of the clerk, where is the necessity or propriety of naming the clerk more than once? In this case the clerk's signature is made a part of the test, and no other name is used. It reads "witness *my hand*," &c., as an original writ in England would read "witness ourself," &c. The words *my hand* preceding the signature of the clerk is equivalent to an insertion of the clerk's name. They refer to the name and supersede the necessity of repeating it. We think the writ is tested with

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substantial correctness, and that the decision below is erroneous.

Judgment reversed.

Smith, McKinley and Poor, for plaintiff in error.

Cook and Dillon, for defendant.

GOULD v. WOODWARD.

A deed, with a defective certificate of acknowledgment, is admissible in evidence, but is not conclusive without further proof.

A deed, defectively acknowledged, is good between the parties, but not sufficient to impart notice of the sale to others.

Appeal from Muscatine District Court.

Opinion by KINNEY, J. Action of right brought by Gould against Woodward. The plaintiff introduced evidence tending to prove his title to the premises and rested. The defendant then introduced a judgment, execution, and sheriff's deed. The plaintiff objected to the deed going in evidence, on the ground that it was defectively acknowledged, which objection the court overruled. To this the plaintiff excepted. The only question for this court to determine is : Was the deed properly admitted in evidence ?

The acknowledgment is as follows :

TERRITORY OF IOWA, }
MUSCATINE COUNTY, } ss.

Before me, James Litly, clerk of the district court in and for said county, personally appeared the above named George Humphreys, sheriff, known to me to be the person whose name is subscribed thereto, and acknowledged the signing of the above to be his free

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and voluntary act and deed, this 14th day of July, A. D., 1845.

JAMES LITLY, *Clerk of said county.*

With the seal of said county hereto affixed.

It is claimed that this certificate is defective in this : that the officer does not state *how* he knows the person making the acknowledgment ; and in support of this we are referred to R. S. 1843, §§ 10, 11, p. 205. Section 11 required that the certificate of acknowledgment shall state the fact of acknowledgment, and that the person making the same was *personally* known to the officer granting the certificate. It will be observed that the officer has left out the word "personally" in his certificate. This certificate is defective for some purposes. It might not be sufficient to charge notice upon a judgment purchaser. But is it such a defect as would exclude the deed from being introduced as evidence ?

Section 34 of the same act, cited by plaintiff, is as follows : " Every instrument of writing conveying or affecting real estate, which shall be acknowledged or proved, and certified as hereinbefore prescribed, may, together with the certificate of acknowledgment, proof, or relinquishment, be read in evidence *without further proof.*" Does it follow that if the deed is not acknowledged and certified as before required, it should not be read in evidence at all ? We think not. It may go in evidence, but shall not be conclusive. If properly acknowledged and certified, no further proof is necessary ; but if defectively certified, we know of no law excluding it from the jury.

In the case of *Strong v. Smith*, 3 McLean, 362, it was decided that a deed not acknowledged, or acknowledged defectively, if recorded in Indiana, would not be notice, but was good between the parties, and, when proved, was admissible in evidence. Vide *Wayman v. Naylor*, 2 Black., 32. An acknowledgment is necessary for the admission of a deed to record, but is not essential to its validity. It can only impart notice by being properly acknowledged and certified. But it has been decided that the estate passes

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to the grantee presently, before the acknowledgment. *Marshall v. Fish*, 6 Mass., 24; *Wash v. Willard*, 13 N. H., 389.

It is not necessary to adduce authorities. The deed was admissible in evidence, under our statute, though the certificate of the officer is defective.

Judgment affirmed.

H. O'Connor, for appellant.

W. G. Woodward, for appellee.

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STOCKTON v. CITY OF BURLINGTON.

Where the bill of exceptions does not purport to give all the evidence, it will be presumed that the facts as found were sufficiently established by other proof.

Where a notice of garnishment was served within ninety days, and the answer, filed at the next term of court, having been mislaid and a new answer filed : held that the new answer should be regarded as a continuation of the first; held, also, that as the amount due from the garnishee was for personal services rendered within ninety days next preceding the notice, it was exempt from execution and attachment.

Appeal from Des Moines District Court.

Opinion by GREENE, J. In the case of *L. D. Stockton v. John McCreary*, the city of Burlington was garnisheed, and answered through the mayor and recorder, that the city was owing McCreary about \$91 75, for work done by him in moving bodies from the old grave yard.

McCreary moved the court to order the money due from the city to be paid over to him, because the amount was his due for personal service rendered within ninety days next preceding the notice of garnishment. The defendant, being

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the head of a family, claimed the wages to be exempt from execution and attachment.

Stockton moved for a judgment against the city for the amount due to McCreary; but, upon a hearing of the motion, and the objections to the same by McCreary, it was overruled and the garnishee discharged. To this decision the plaintiff now interposes two objections: *First*, Because there is nothing in the evidence to show that the debt was due McCreary for his personal services, or that he was the head of a family. Although these facts may not be sufficiently proved by the evidence contained in the bill of exceptions, still, as the bill of exceptions does not purport to give all the evidence in the case, we must presume that the facts were sufficiently proved to the court below. *Second*, That as the levy was made in October, 1853, and the work performed in April of that year, more than ninety days elapsed after the service was performed before the levy was made. But it seems that the notice of garnishment had been served upon the city at the spring term of the court, and within the ninety days; and that the city at that term filed an answer, but the plaintiff objected to a hearing at that term, and the hearing was continued till the next term of the court, at which the old answer was misplaced and a new one substituted. There having been no negligence shown on the part of McCreary, or the city, the court very correctly admitted this substitute answer as a continuation of the original. The propriety of doing so was addressed to the sound discretion of the court. Besides, we think this ruling was authorized by § 1668 of the Code.

Judgment affirmed.

L. D. Stockton, pro se

T. D. Crocker, for defendant.

Stein v. Keeler.

STEIN v. KEELER.

Where fraud is set up in defense of a note which was indorsed to plaintiff before due, the answer should charge the holder with notice of the alleged fraud, or that he was a party thereto.

Fraud is no defense to a note which came into the possession of a *bona fide* holder, without notice, for value, and before due.

Section three of revised statutes, p. 453, is applicable only to instruments assigned after due.

Appeal from Muscatine District Court.

Opinion by KINNEY, J. Suit brought on a promissory note for \$333 33, dated October 30th, 1848, and due thirty-three months after date, payable to Henry Q. Jamison or order, signed by John G. Stein. Note assigned to Keeler before due. Petition in the usual form. Defendant answers that Jamison obtained the note by fraud, and sets out specifically in what the fraud consisted.

To this answer the plaintiff filed the following demurrer:

1. The answer of the defendant does not charge the plaintiff with notice of the alleged fraud.

2. The plaintiff is not a party to the said alleged fraud set forth in defendant's answer, nor does the answer so allege. This demurrer the court sustained; and rendered judgment for the plaintiff for the amount of the note, and interest. It is said that this is error.

We think the court ruled correctly. The note being negotiable, assigned to, and falling due in the hands of a third person, it was necessary, before a recovery could be prevented on the ground of fraud in its procurement, to connect the assignee with that fraud as party, or by proving actual or constructive notice of the fraud. Mr. Chitty lays down the doctrine to be, that a bill or note having been obtained without adequate consideration, or even by

duress or fraud, or misapplied by an agent to his own use, affords no defense, when the instrument came into the possession of a *bona fide* holder without notice for value, and before it was due. Chitty on Bills, p 90. This for the reason that if one of two persons must sustain a loss, he who has suffered a negotiable security, with his name attached to it, to get into circulation, ought to bear the loss, and seek his remedy against the person who has improperly passed the instrument.

Winstanley v. Bowden, 1 Sewl., 402, was an action by the indorsee against the maker of a promissory note. The defense insisted on was, that the note had been given for hits against the defendant in a lottery insurance. Lord Kenyon, C. J., thought the plaintiff was entitled to recover; observing, that the innocent indorsee of a gaming note, or note given on an usurious contract, could not recover, but that in no other case could the innocent indorsee be deprived of his remedy on the note, and that a contrary determination would shake paper credit to the foundation.

Illegality of consideration will be no defense in an action at the suit of a *bona fide* holder without notice of the illegality, unless he obtained the bill after it became due, without it is so *expressly* declared by the legislature. *Brown v. Turner*, 7 T. R., 630; *Wyatt v. Bulner*, 2 Esp. R., 538,

Was there such express legislation in Iowa? We are referred to Rev. Stat., p. 453, § 6. This section must be construed in connection with the 3d, 4th and 5th of the same act. When so construed it can only apply to instruments assigned after due. This is clear and will admit of no other construction, and preserve the object of the preceding sections. Section four allows the same defense upon an assigned note, as if it had not been assigned, *providing* it be indorsed after due. Section four permits the maker upon a note assigned before due to prove payment before it was indorsed, *provided he proves that the*

Stein v. Keefer.

plaintiff had sufficient notice of the payment before he accepted the said instrument. Section five allows the defendant to show a want of consideration, or a failure of consideration in whole, or in part, in a suit commenced by any person upon a note, bond, bill or other instrument of writing, &c.; "*providing* that nothing in this section shall be construed to affect, or impair the right of any *bona fide* assignee of any instrument made assignable by this act, when such assignment was made before such instrument became due."

Thus it will be seen that the statute so confidently relied upon by plaintiff, sustains the decision of the court below. The spirit and interest of this statute, are to protect innocent holders of negotiable paper. According to principle, adjudged cases, and the statute, the answer was demurrable.

Judgment affirmed. 4

J. Scott Richmand, for appellant.

H. O'Connor, for appellee.

McIntire v. Skinner.

MCINTIRE v. SKINNER.

M. held a claim on one-quarter of a quarter section of land, and contracted with S. for one-quarter of a one hundred and sixty acre land warrant, with the understanding that S. should enter the quarter section of land in his own name, and deed to M. his portion. After entering the land, S. recognized the arrangement in two or three transactions, but finally, when M. tendered to him the price stipulated for one-fourth of the warrant, S. refused to make the deed: held that the circumstances and equities removed the case from the statute of fraud, and created a trust which should be enforced against S.

An oral trust may be established by parole testimony, if a voluntary acknowledgment can be proved.

A resulting trust may be established by parole proof.

IN EQUITY. *Appeal from Wapello District Court.*

Opinion by GREENE, J. Bill filed for specific performance. It avers that in 1849, J. McIntire, the complainant, was owner of a claim on the north-east quarter of north-west quarter, section eighteen, township seventy-one, range thirteen, upon which he had valuable improvements; that the defendant being then owner of a land warrant for 160 acres, it was agreed by the parties that complainant should have one-fourth of the land warrant for \$37 50, and that the warrant should be located on said north-west quarter section of land in the name of defendant, and that he should then convey the north-east quarter of said quarter section to complainant; that defendant undertook the trust and under the agreement to deed the north-east quarter to complainant, entered the land with the warrant in his own name; that after defendant was vested with the title, complainant applied to him for a deed to his portion of the land so purchased in trust for him, and tendered to defendant the \$37 50 agreed upon as the price of the one-fourth of the warrant, but the defendant refused to make the deed; the petition

prays for a deed and tenders the money in court. Defendant's answer denies the trust, and assumes that if any promise or contract was made it was not in writing, but was oral and within the statute of frauds. Replication wholly controverts the answer and re-affirms the trust. Case submitted on the pleadings and depositions. Petition dismissed.

We think the averments in the petition are wholly confirmed by the depositions.

It seems by the evidence that there was an understanding that complainant might pay for the fourth of the warrant in prairie breaking, at some convenient time to complainant. Defendant said he "was not particular when—most any time would do." But when McIntire offered to do the breaking, defendant did not wish to have it done then, because it was too late in the season, and not on the ground that he had not sold him one-fourth of the warrant. When the tender was made, Skinner did not deny the contract or the trust, but when asked if he would take the money merely replied, "not now." At another time Skinner remarked that he would not make a deed to McIntire till he took back certain offensive words. In this he virtually recognized the trust and his contract to deed, but assumed the right of exacting an apology as an additional condition upon which the deed should be given. These circumstances in connection with the direct and positive evidence adduced in support of the petition, are sufficient to overcome all conflicting evidence and make out a strong case for complainant.

The contract, as originally made and subsequently recognized by defendant, clearly created a trust; but as the contract was oral, it is claimed that it comes within the statute of frauds. If the trust rested only on a naked declaration, and if disconnected with the purchase of one-fourth of the land warrant, and in relation to public land on which complainant had no valid claims, this objection would be good. The peculiar circumstances and strong equities of

this case removes it from the statute of frauds. Complainant proves that he had a valid claim and improvements on the land in question, comprising one-fourth of the land entered with the warrant. He proves that he purchased one-fourth of the warrant before the land was entered. The fact that defendant agreed to take his pay in breaking, and at a subsequent period, did not invalidate the purchase. The case then is this: In consideration of complainant's claim on one-fourth of the land, and in consideration of his having purchased one-fourth of the warrant, at the price stipulated, defendant undertook the trust and entered the land in his own name for their joint benefit.

The land upon which this warrant was laid was claimed jointly by the parties, but this claim was encumbered by the legal title of the United States. It was agreed that one of the joint claimants should remove the incumbrance and perfect the title for their joint benefit, and share in proportion the expense. So in *Lee v. Fox*, 6 Dana, 176, one of several joint tenants bought an incumbrance on the joint possession, and it was held that the purchase might inure to the equal benefit of his co-tenants, upon condition of paying their due proportion of the actual cost. How much stronger is the case at bar? Complainant had already made provision for his proportion of the actual cost.

In *Pierce v. Pierce*, 7 B. Monroe, 433, it was held that if a conveyance be made to A, and B proves that he paid a part of the price for his own use, a trust results in favor of B, though not named in the deed. In this case, complainant's claim and improvements on the land, and his purchase of one-fourth of the warrant, render the statute of frauds inapplicable. Besides, equity will enforce a parole trust, though the statute of frauds be relied on. 1 McCord, C. R., 119. It is objected that the depositions in this case should have been rejected, because they only establish an oral trust by oral proof. A trust need not be created by writing when it can be proved by writing. But it need not even be proved by writing if a voluntary acknowledgment

can be proved. Here an acknowledgment was proved and that dispenses with written proof. Besides, this is a case of resulting trust, and such a trust may be established by parole proof. *Bottsford v. Burr*, 2 John. Ch., 409; 3 Mason, 347; 3 Litt., 399. We say this is a resulting trust, because complainant had a recognized claim on the land, and an acknowledged interest by purchase in the warrant by which the title was perfected; and having those rights to the claim and warrant before purchase, a trust must equitably result from them. These rights, to claim and warrant, are the whole foundation of the trust, and as completely remove the case from the statute of frauds, as a payment of the purchase money could have done. The trust resulting from those rights having been clearly proved by facts and distinct acknowledgment, we cannot consider the statute of frauds as applicable to the case.

We therefore conclude that complainant's equity in one-fourth of the quarter section is fully established, and that he is entitled to a deed on payment of one-fourth of the price stipulated for the warrant, with interest up to the date of tender.

Decree reversed.

Wright & Knapp, and *Caldwell*, for complainant.

H. G. Hendershott, for defendant.

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DAVIS v. MOFFITT.

This court will not reverse upon questions of fact, unless the testimony of record clearly shows error,

All legal presumptions will favor the decision below.

Where a plea in abatement put in issue plaintiff's right to the office of supervisor, it was incumbent upon him to show that he held the office by right.

Appeal from Cedar District Court.

Opinion by KINNEY, J. Suit before a justice, brought

Davis v. Moffitt.

for refusing to work on the road. Plea in abatement; trial had, and judgment for plaintiff. Appeal to the district court. Jury waived, and the question of fact as well as law, whether Davis was supervisor, submitted to the court, and judgment for defendant upon his plea in abatement. The testimony, by agreement, is sent up to this court. From that testimony we cannot see that the court erred. Acting as a jury, unless that testimony was clearly insufficient to authorize the decision, the court would not reverse. All legal presumptions are in favor of the decision. The judgment will not be disturbed unless the error is palpable. There is no particular ruling of the court upon any question of law by which the error, if any, is made manifest; no bill of exception.

The testimony shows that Davis was supervisor *de-facto*, and one witness swears that the township clerk informed him that he had been sworn into office. The clerk testified that Davis was not qualified; other witnesses testify that the people did not work the road under him, because they thought he had not taken the oath of office. It seems that there was no recognition of him as an officer, by those whose duty it was to perform labor upon the highway, and as the plea in abatement put directly in issue his right to the office, it was incumbent upon him to prove that he was an officer *de jure* as well as *de-facto*. It does not appear from the testimony that he did this, and the court, so far as we can judge, decided correctly in rendering judgment against him.

Judgment affirmed.

¶ Wm. Pena Clarke and S. Whicher, for appellant.

W. H. Tuthill and Wm. Smyth, for appellee.

DAVIS COUNTY v. HORN.

Where easy access to a higher court is afforded by appeal, such court should in the exercise of a sound discretion, refuse the common law writ of *certiorari*.

A party in no way effected by the proceeding and a stranger to the record, not entitled to an appeal, nor to a writ of *certiorari*.

Error to Davis District Court.

Opinion by GREENE, J. In July, 1849, the commissioners of Davis county allowed the school-fund commissioner a sum stated, for his services, to be paid out of the school fund. To correct this proceeding, Hosea B. Horn, a third party in no way connected with the proceeding, sued out a writ of *certiorari* and had the case certified to the district court, where the decision, so far as it affected the school fund, was reversed. The question is raised : Was the writ of *certiorari* authorized?

We agree with the court below, that the district courts may at common law issue writs of *certiorari* to have the proceedings of inferior tribunals certified before them, in order to revise and correct those proceedings when found illegal. But this writ should not be issued when the right of appeal exists, unless there has been a usurpation of power in the denial of that right. *Gomstock v. Porter*, 5 Wend., 98; *Wood v. Randall*, 5 Hill, 264. Our district courts have jurisdiction in all civil and criminal matters arising in their respective districts, in such manner as shall be prescribed by law. Const., Art. 564. They are invested with all the attributes of common law tribunals, to the same extent as the King's Bench, Common Pleas, and Exchequer courts of Westminster ; but the manner of exercising this jurisdiction may be modified by statute. Where easy access to a higher tribunal is afforded by appeal, a

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court should, in the exercise of a sound discretion, refuse the common law writ of *certiorari*.

But in the present case, Horn not having been a party to the record before the commissioners' court, he was not entitled to an appeal, nor does it follow that he was entitled the writ of *certiorari*. He was a stranger to the record, and appears to have been in no way affected by the proceedings. He appears to have had no agency over a connection with the school fund. By what legal authority, then, could he come in and object to the proceedings before the commissioners, in relation to that fund? The superintendent of public instruction might, perhaps, have applied for this writ with some show of authority, and could, with propriety, object to the illegal appropriation of the school fund; but clearly a person in no way affected by, or connected with the transaction, could not.

Judgment reversed.

A. Hall and D. P. Palmer, for plaintiff in error.

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LEWIS v. MILLER.

An appeal from the district to the supreme court is taken by service of a notice in writing, on the adverse party and the clerk. This must be done under the Code, within one year from the date of judgment.

From Lee District Court.

Opinion by KINNEY, J. Motion made in this case to dismiss the appeal on the ground that it was not taken within a year, as notice was not served on appellee within that time. The Code § 1978, requires appeals to be taken

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within one year from the time the judgment is rendered, and § 1974, provides for the manner of taking appeals. This is "by service of a notice in writing on the adverse party, his agent or attorney, and also on the clerk of the court in which the proceedings were had," &c. It appears from the record that the notice upon the clerk was in time, and the transcript was duly filed in this court, but as the appeal can only be taken by service upon the adverse *party and clerk*, and as service upon the party is just as essential as upon the clerk, it follows that unless the statute in this particular has been complied with, the appeal is not properly in this court, and should be dismissed. The object of the notice upon the clerk is to authorize him to make the transcript, and this notice is substituted for, and performs the office of the writ of error under the former practice. But the opposite party can only be made appellant by the service of notice upon him. It is as necessary in order to make him a party in this court as the original notice or writ in the court below.

Motion granted.

L. R. Reeves, for the motion.

J. C. Hall, against.

Johnson v. Triggs.

JOHNSON v. TRIGGS.

It is essential to the validity of a tender of money, that he who makes the tender should have the money in court. The necessity for this rule is not obviated by the Code. KINNEY, J., *contra*.

If a tender was not claimed on the trial before a justice, it should not be entertained on appeal in the district court.

A tender of the amount due, does not satisfy the demand, but if kept good, it stops interest and saves cost.

A tender admits the plaintiff's cause of action to the amount of the sum tendered.

Appeal from Keokuk District Court.

Opinion by GREENE, J. This suit was commenced by J. C. Johnson, before a justice of the peace, on an account against J. Triggs. Plaintiff recovered judgment for \$1120. Defendant appealed to district court, where judgment was rendered against the plaintiff for costs amounting to over one hundred dollars.

It appears that a jury was waived, and that the court found the facts to be in substance as follows: That plaintiff let the defendant have 1200 shingles, worth at the time \$4 20; that before suit was commenced defendant tendered to the plaintiff \$4 25, in silver, to pay for the shingles, but he refused to take the money, and that at no time before suit did plaintiff give notice of his intention or readiness to accept the tender; that the defendant did not offer to pay the money before the justice, nor in the district court, and did not in any way claim or pretend to have the money ready for plaintiff. Upon these facts the court finds for the defendant, and it is ordered that the plaintiff pay the costs herein, and the court holds that it is not necessary, in order to keep the tender good, that the same should have been brought before the justice, or in this court, unless there had been a demand by plaintiff subsequent to the tender and refusal.

Johnson v. Triggs.

To this decision two exceptions are made :

1. It is urged that if defendant intended to rely upon his tender, he should have produced the money before the justice and in the district court. A majority of the court entertain the opinion that the Code, § 966, makes no change upon the prevailing rule in this particular. It only provides that the party may retain in his possession the money or property tendered, but if the other party afterwards gives notice of his willingness to accept, the tender will be of no effect, if not delivered to him within a reasonable time. But the Code in no way removes the necessity of a tender, or an offer to tender the money in court, in order to keep the tender good. Here was an unconditional indebtedness; the defendant acknowledged that he owed the plaintiff \$4 25 for shingles, but plaintiff claimed more than that sum; if then the defendant wished to rely upon his tender, he should have had the necessary amount ready, not only before the justice, but also in the district court. So far from doing this, it appears of record that the question of tender was not even raised before the justice. As the tender was not urged before the justice, it could hardly be deemed in order, or according to the spirit of the Code, to admit such new defense on appeal in the district court. Code, § 2344.

Besides, the amount claimed to have been tendered appears to have been inadequate to the amount found to be due the plaintiff by the judgment of the justice. The plaintiff claimed \$15. The justice found \$11 20 to be his due, while the district court estimated the amount at \$4 20. At common law a tender is not allowed when the claim is unliquidated and so uncertain, that the amount is to be determined by the discretion of a jury. A tender may be made in all cases when the demand is certain or capable of being made certain by mere computation. *Green v. Shurtliff*, 19 Vt., 592; *Day v. Lafferty*, 4 Pike, 450; *The People v. Steinbury*, 1 Denio, 635. Of course, if the defendant had tendered as much as the plaintiff

claimed to be his due, it was sufficient. But still, the party having made the tender, it should have been urged specially in the action before the justice of the peace, if he intended to rely upon it. *Griffin v. Tyson*, 17 Verm., 35.

The necessity of having the money in court, in order to make a plea available, is quite uniformly conceded. *Sheriden v. Smith*, 2 Hill, 538; *Earle v. Earle*, 1 Harr.; *Wing v. Hurlburt*, 15 Verm., 607; *Booth v. Comeggs*, Minor, 201; *De Wolf v. Long*, 2 Gilman, 679; *Jasboe v. McAttee*, 7 B. Mon., 279; *Brown v. Furgison*, 2 Denio, 196. The reason why the money should be in the court is obvious. A tender of the amount due does not satisfy the demand. It only stops interest, and if kept good saves cost. After the tender is made, the money justly belongs to the creditor, and should be, therefore, at all times accessible to him. In *Sands v. Lyon*, 18 Conn., 18, it is decided that in order to make a legal tender of a debt, it is necessary, as a general rule, that the money be actually produced and placed within the power of the creditor to receive it. There is nothing in the Code of Iowa which removes the reason for this rule. There is nothing expressed, and clearly nothing should be presumed against the prevailing doctrine. Especially as tenders are *stricti juris*, and nothing should be presumed in their favor. *Shotwell v. Dennman*, Coxe, 174.

2. Upon the facts as found and stated by the court below, it is claimed that judgment should have been rendered for the plaintiff. This point in the case is even more flagrant than the first. It is singular that the court could find an amount due the plaintiff, and still render judgment against him. If the view entertained by the court in relation to the tender was correct, it could only clear the defendant from costs. It could not operate as payment and satisfaction. The very fact that defendant made a tender to plaintiff showed an indebtedness of at least that amount. In *Wood v. Perry*, 1 Barb., 114, it is held that when a tender

is made and relied upon, the plaintiff will be entitled to recover that amount without proof on his part. *Slack v. Price*, 1 Bibb, 272; *Eddy v. O'Hara*, 14 Wend., 221; *Basly v. Bucher*, 6 Watts., 74; *Sheridine v. Gaul*, 2 Dall., 190. Aside from the authorities, the proposition would seem self-evident, that a tender admits the plaintiff's cause of action to the amount of the sum or thing tendered.

Judgment reversed.

Dissenting Opinion by KINNEY, J. This cause was submitted to the court below, who found from the testimony the following facts, which, at the request of the plaintiff, were reduced by the court to writing :

"1. It is found that plaintiff did let defendant have twelve hundred shingles, as charged in his account; and that said shingles were worth \$3 50 per thousand at the time he obtained them; and that at such price said shingles were worth in the whole \$4 20.

"2. It is found that before the commencement of this suit before the justice, the said defendant tendered to the said plaintiff \$4 25 in silver, to pay for the shingles so got by the defendant; that plaintiff refused to take the same; and that the plaintiff did not, before the commencement of this suit before the justice, give the defendant notice of his intention or readiness to accept the said tender.

"3. The court also find that on the trial before the justice, the said defendant did not bring his said tender before said justice, and did not then have the same ready, and before the court for the plaintiff, or any part thereof; and also on this trial, here now before the court, no money is produced in court, and no offer to pay or produce the said tender, or any part thereof, is made; and that since the time of said tender of said \$4 25, so made *before the commencement of the suit by the justice*, the said defendant has not produced the same, either at the trial before the justice or in this court."

Upon these facts the court found for the defendant and ordered the plaintiff to pay the costs, and held that it was not necessary to keep the tender good that the same should have been brought before the justice, or in the court, unless there had been a demand by plaintiff subsequent to the tender, and a refusal by defendant, and that the commencement of the suit is not such demand. To this the plaintiff excepted, and claimed that the judgment of the court upon the facts found should have been for the plaintiff.

I cannot agree with a majority of the court in reversing this judgment. The judgment is to my mind in strict conformity with the provisions of the Code. As the rule formerly stood, it was necessary in order to keep the tender good, that the money should be deposited in court as soon as it could be done. This practice was inconvenient, and could not always obtain where the tender was first made. For instance, when the man making the tender became the defendant, he could not, before suit brought, bring the money into court, for there was not as yet any litigation between the parties. The plaintiff might sue in the district court, or before a justice of the peace, each possessing concurrent jurisdiction up to one hundred dollars. Hence, the money had to be deposited with some third person, which occasioned great trouble, and at times this was extremely difficult to do. And when it became necessary to bring the money into court, it frequently became burthensome to the clerk, and after guarding it from term to term, the suit would probably terminate in such a manner as made it necessary to give the money back to the man who tendered it. And personal property, which never could be brought into court, had to be deposited with some person, and, as was the case with live stock, be kept at great expense, waiting the uncertain result of some severely litigated and long protracted lawsuit.

Here then was a mischief which demanded a remedy. This law of tender was one of those excrescences which our able commissioners very wisely concluded to lop off, as a

worthless appendage, and entirely unnecessary to the administration of justice. We want only such laws as will promote and secure, not hinder and prevent justice. This sentiment seemed to actuate the commissioners in preparing, and the legislature in passing our present Code. It is well known that under our old system, a party with an honest case would frequently be turned out of court with a large bill of costs, because some technicality in pleading, made essential by Mr. Chitty, but having no possible connection with the merits of his case, had not been adopted by his attorney. The law on the subject of tender as it existed at common law, demanded reform, and it was quite as necessary as in the law relative to pleadings. Hence chapter 59 of the Code was passed. Section 966 provides: "When a tender of money or property is not accepted by the party to whom it is made, the party making it, may, if he sees fit, retain in his own possession the money or property tendered; but if afterwards the party to whom the tender was made see proper to accept it, and give notice thereof to the other party, and the subject of tender be not delivered to him within a reasonable time, the tender shall be of no effect." This language is plain, and, it seems to me, cannot be misunderstood. In express terms, it gives the party making the tender a right to retain it in his own possession. If the party to whom it is made is willing to accept, all he has to do is to give the other party notice of that fact. If then the money or property tendered is not forthcoming, the tender is of no avail. This is a sensible doctrine. The tender is just as good in the possession of the person making it as any where else, providing it is produced when required; and, unless required, the person to whom made waives all right to it.

But it is contended by a majority of the court that the commencement of the suit was the notice spoken of and intended by the Code. Such cannot, in my opinion, be the case. If the legislature had intended that such a notice should have been given, they would have said that such

tender should be good until the party was notified by suit to produce the same. The object of all good legislation is to suppress rather than encourage litigation. But, if the construction contended for, prevails, then a lawsuit is encouraged, costs made, bad feeling between neighbors engendered, without any necessity; for it will not be pretended but that a notice without suit would have been sufficient. Courts should not force parties into a lawsuit; should not so construe a law as to make a suit necessary, when by a reasonable construction such suit could be prevented. The whole law of tender is to prevent litigation and costs. It proceeds upon this basis; but if costs must be made, let them fall upon the party who would not accept the amount tendered, providing it is all he proves himself entitled to. It cannot reasonably be contended that the suit *in this case* was a notice to the opposite party to accept the tender. And first, if he was willing to accept, why sue at all? Had he not expected that he could recover more than the amount tendered, I can hardly think he would have instituted his suit. But be this as it may, it was no notice to accept, because he sues for fifteen dollars; and, instead of advising the other party that he would accept the \$4 25 tendered, it seems to me that it was notice to him that he would not accept it, and that nothing less than \$15 00 would be received. Hence, in no possible way can this suit be construed into notice to accept. The Code is: "But if afterwards the party to whom the tender was made see proper to accept it, *and give notice thereof to the other party,*" &c. Is there any thing in the bringing of this suit for \$15 00 which proves that the party saw proper to accept the tender? Does it not prove the reverse; that he would not accept? When the defendant was notified by the officer that he was sued, and that the plaintiff claimed \$15 00 from him as justly his due, was there any thing in that which would give the defendant to understand that the plaintiff would accept the \$4 25 which he had tendered? In other words, was this a notice to accept the tender? I think not;

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and yet when this case was decided it was put upon this ground. In my opinion, the judgment of the district court should be affirmed.

Geo. G. Wright, for appellant.

Slagle and Acheson, for appellee.

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WINCHESTER v. AYRES.

Where the record shows that any other person than the judge *de-jure* decided the cause in the district court, the judgment should be reversed.

Section 1797 of the Code unconstitutional so far as it authorizes any person—not in reality a district judge—to act in that capacity with all the powers of the court.

Appeal from Polk District Court.

Opinion by KINNEY, J. The record in this case discloses the fact that Joseph E. Jewett, Esq., was selected by the parties to try the cause. That he acted as judge, and as such, signed the bill of exceptions.

It has been repeatedly decided by this court that parties could not substitute a person in the place of the regularly-elected and qualified judge of the district. It matters not that it is by consent, and that no objection is made in this court. We can recognize no one as judicial officer except such as are so by law; no transcript purporting to emanate from the district court is received, unless it appears that the judge was presiding, and no judgment is valid except it be rendered by the court. But it is said that § 1797 of the Code authorizes the parties by the consent of the court to select any person to act as judge for the trial of a particular case. True the Code so provides. But the

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section is clearly unconstitutional. The constitution points out the manner in which district judges shall be elected and qualified. The legislature has no power to authorize a district judge to place his judicial robe upon the shoulders of any man. If he can do it in a particular case, he can do it in *each* particular case by consent of parties; fold his arms and smile complacently upon his self constituted court.

The legislature may have intended this substitution for the convenience of parties, in case the judge was interested, or had been of counsel, presuming that the court would not permit the record to exhibit any change. The record of the court being absolute verity, unimpeachable, if it appeared that the judge presided in the trial of the cause, although in point of fact, the bench was occupied by a stranger, yet that could not be shown *aliunde*, and the judgment would be valid.

But when the substitution appears of record, the trial is void, the judgment mere waste paper, and all proceedings under it a nullity.

Judgment reversed.

C. Bates, for appellant.

Casady and Tidrick, for appellee.

NIGHTINGALE v. BARNEY.

Where it appeared that a note belonged to a voluntary association of individuals not incorporated, and that the plaintiff had no interest therein, the court should find for defendant.

A mere moral obligation is not a sufficient consideration to support a note between the parties to such obligation.

Appeal from Dubuque District Court.

Opinion by GREENE, J. An action of assumpsit commenced in the name of William J. Barney, against George L. Nightingale, on a promissory note. It appeared in evidence that the note was given to W. W. Corriell without consideration, but was given to him as an officer of Dubuque lodge, No. 3, and for the benefit of said masonic lodge, for initiation fees. The note was indorsed to the plaintiff without consideration, and was sued for the exclusive benefit of said Dubuque lodge.

Defendant moved the court to instruct the jury that if the note belonged to a voluntary association of individuals, not incorporated, and not to the plaintiff, they must find for the defendant. This, and other instructions of like import, were refused, and among other things the court instructed the jury, "that although a voluntary association is unknown to the law, and cannot bring suit in its own name, it does not follow that if a person is really indebted to such an association and has given a note to an individual for the benefit of such association, that an action may not be brought upon the note. That a mere moral obligation to pay money is a good consideration for a note. A promise to pay money for another, creates a moral obligation, as also does the receipt of money belonging to a voluntary association." In the instructions thus refused and given by the court below, it is claimed there is error.

None but a natural or artificial person can become a •

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party to a suit. An unincorporated association, such as a masonic lodge, cannot be recognized as a person or party at law, and hence cannot sue or be sued. And, under the Code, § 26, p. 13, the word person is only "extended to bodies politic and corporate." Such an association, then, not being a person in law, cannot become a party to a contract or a suit.

In the present case it is conceded that no consideration passed from Corriell or Barney for the note, that neither of them was a party to the contract, and that the unincorporated Dubuque lodge No. 3, is alone to be benefited by the recovery, is the only real party in interest. The Code stipulates that "civil actions must be prosecuted in the name of the real parties in interest." § 1676. But in this case the real party in interest is not made the party to the suit, and could not be, because not a party or person recognized by law. We conclude, then, that the court erred in refusing the instructions asked for defendant. We also think that the court erred in charging the jury, that an action may be maintained upon a note given for the benefit of an unincorporated association. A contract or a note cannot be made without two parties; such association is not a party or person at law, and therefore a contract made by one party with such association cannot be valid.

Nor can we approve the unqualified language of the court below that, "a moral obligation to pay money is a good consideration for a note." As the doctrine now prevails something more than a mere moral obligation is necessary to create a good foundation for an action between the parties thereto. There must be a consideration esteemed valuable at law, before an express promise can create or revive a legal liability. In Story on Promissory Notes, § 185, we are expressly informed that "a mere moral obligation, although coupled with an express promise, is not a sufficient consideration to support a note between the same parties."

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Besides, from the record before us we cannot see how even a moral obligation rested on Nightingale to pay the note to Corriell or Barney. There is nothing intimated that creates such an obligation. Nothing to show that C. or B. was placed under obligation to pay the money due from N. to Dubuque lodge, or that N. was in any respect benefited by the action of C. or B. Had Corriell paid the initiation fees to the lodge for Nightingale, without his request; and if in consideration thereof, Nightingale had subsequently given his promissory note, a very different case would have been presented. There would have been something more than a mere moral obligation; there would have been a valuable consideration which would have rendered valid Nightingale's express promise to pay.

Judgment reversed.

B. M. Samuels, for appellant.

P. Smith, for appellee.

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MURRAY v. CATLETT *et al.*

Where a mortgagor had sold his equity of redemption, and all right to the property subject to the mortgage, he need not be made a party to the bill of foreclosure.

A mortgage was given to secure notes signed by M. as principal and H. as security, and H. having paid the note last due, took an assignment of the mortgage: held, that the payment of the note by the surety did not discharge the mortgage lien, and that H. as such surety, was entitled to the benefit of that security, to reimburse him for the payment he had made.

Appeal from Muscatine District Court.

Opinion by GREENE, J. Proceedings commenced under

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the Code, by H. Murray, to foreclose a mortgage against defendants. The mortgage was executed by Malcolm Murray to secure the payment of notes jointly and severally made by said M. and H. Murray; the latter having signed only as security. The amount last due was paid by Henry, who thereupon took an assignment of the mortgage and note in consideration of the payment, and M. Murray conveyed his equity of redemption to defendants. Defendants demurred to the petition:

1. Because M. Murray and wife were not made parties.
2. Because the mortgage was given to secure the payment of joint and several notes, which had been paid.

The demurrer was sustained; and in this it is claimed that the court below erred.

1. Were M. Murray and wife necessary parties to the petition? It appearing that they had conveyed their equity of redemption in the property, and having sold subject to the mortgage, they had no interest in the event of the foreclosure proceedings; still, defendants could assume that upon general principles the mortgagor should be a party defendant. But this we think depends upon the fact of his being interested in the suit. If in fact, and upon the face of the proceedings, he has divested himself of all interest in the property mortgaged, there can be no necessity or propriety in making the mortgagor a party. As a general rule all persons having an interest in the property, so far as to be affected by a decree in relation to it, should be made parties. Story Eq. Pl., 176, 182. We cannot consider our statute as innovating upon this general principle. True, it provides that suit may be commenced against mortgagor, &c., but this can only be applicable to cases where the mortgagor has some rights or equities in the premises. Rev. Stat., 442.

It has been repeatedly decided that a mortgagor need not be made a party to a bill of foreclosure where he had conveyed his equity of redemption. 1 Green, N. J., ch.,

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R. 104, 405; 5 Conn., 531; 8 Black., 165; 20 Ohio, 474; 13 Ill., 501; 1 Powell, on Mort., 405, *a*, note 2. It follows therefore, in this case, that it was not necessary to make M. Murray a party defendant.

2. The second objection to the petition is that it claims the foreclosure of a mortgage executed to secure the payment of joint and several notes made by M. Murray and the petitioner, and which appear to have been paid.

To remove this objection, the petition states that complainant signed the notes as security for M. Murray; that as such security he paid off a balance of four or five hundred dollars on the last note, and thereupon took an assignment of the note and mortgage. But it is assumed that the payment of the note by the surety, discharged the lien of the mortgage. This by no means follows. The surety had as good a right as any third party to purchase and take an assignment of the mortgage, and to hold the land subject to full satisfaction of the incumbrance. That the payment of the note by the surety did not discharge the mortgage lien is shown by many authorities. 2 Brock., 160, 167; 12 Wheat., 594; 2 Rand., 514, 530; 1 McCord, 107, 117; 1 Hill, 344, 351; 1 Edward, 164; 1 Barr., 517; 17 Conn., 583; 1 Ala., 23; 11 Ohio, 444; 8 Mo., 169; 4 John., ch. 123.

In cases like this, courts of equity have gone to a liberal extent in support of the rights and claims of sureties against their principals, in all cases where additional pledges have been given for the debt. If the surety pays the indebtedness, it is reasonable that he should have the full benefit of all the additional securities. This principle is fully recognized in 1 Story's Eq., 322, 477. An example given by Judge Story is appropriate to the case at bar. "If at the time when the bond (or note) of the principal and surety is given, a mortgage also is made by the principal to the creditor, as an additional security for the debt, then, if the surety pays the debt, he will be entitled to

Murray v. Catlett.

have an assignment of that mortgage, and to stand in the place of the mortgagee."

So in England, in a case like the present, where there are collateral securities, the security becomes subrogated to the place of the creditor, and he may enforce payment from those collaterals. *Copies v. Middleton*, 1 T. R., 229.

As a protection to sureties, the doctrine is now well settled, that although the security or lien may be extinguished at law, yet, for the benefit of the surety, it continues equitably in force when he has paid the demand of the creditor.

We are, therefore, clear in the opinion, that as Murray signed the notes as surety, and paid off the note last due, and took an assignment of the mortgage, which was given as a collateral security for the payment of the notes; that the payment of the note by him did not discharge the mortgage; that the lien on the property is in full force; that the mortgage may be foreclosed by H. Murray as assignee, and that therefore the court below erred in sustaining the demurrer.

Decree reversed.

Wm. Penn Clark, for appellant.

S. Whicher and *L. B. Patterson*, for appellee.

SCOTT v. WARD.

A note given on a claim which would authorize a mechanics' lien was indorsed by the payee in blank: held that if the indorsement indicated the belief that the note had been negotiated, the plaintiff should be permitted to prove the contrary.

The acceptance of a note is not a waiver of a mechanics' lien; but if such note should be actually negotiated, the lien would be lost.

Appeal from Muscatine District Court.

Opinion by GREENE, J. This suit was commenced by Scott against Ward, in the district court, for a mechanics' lien. Trial by jury waived. A general judgment rendered in favor of plaintiff, but the mechanics' lien was refused. Plaintiff appealed, and claims that the lien should have been granted.

It appears that on settlement for the work and materials, Ward gave his notes to Scott; that these notes, on being produced in court appeared to have been indorsed in blank by Scott, but the indorsement had been erased. The plaintiff offered to prove that the notes had not been negotiated by him and that they had been at all times under his control. Upon this point the court declined proof, and decided that as the notes appeared to have been outstanding, the lien should not be granted. We think the court erred in refusing to receive the evidence, and in deciding against the lien. If the erased indorsement induced the belief that the note had been negotiated, the plaintiff should have been permitted to prove the contrary. If the note had been negotiated, or had passed from plaintiff's control to the ownership of another, the lien given by statute would be lost. Such transfer would be regarded, at law, as a waiver of the lien. Hence, the court should have admitted proof that the note had not been thus disposed of.

Queen v. Griffith.

The court also erred in deciding that an outstanding note for the work or materials would preclude the lien. It has repeatedly been decided by this court that the acceptance of a note is not a relinquishment of a mechanics' lien. *Greene & Bro. v. Ely*, 2 G. Greene, 508; *Mis v. Ely*, *ib.* 513; *Hawley v. Ward*,* decided at this term.

We conclude, then, that an outstanding note for work and materials which entitles the party to a lien, does not operate as a forfeiture of the lien, unless such note has been actually negotiated or transferred to another party. A blank or erased indorsement is by no means conclusive that the note had been negotiated. As the court below erred in refusing the lien, a judgment will be rendered in this court in favor of plaintiff and the lien granted.

Judgment reversed.

S. Whicher, for appellant.

W. G. Woodward and *H. O'Connor*, for appellee.

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QUEEN v. GRIFFITH *et al.*

Unless an attachment is asked for in the petition, it should not be issued. Where a petition for attachment is amended materially, such amended petition should be sworn to.

Appeal from Polk District Court.

Opinion by GREENE, J. Petition filed by Griffith & Co., against Mary A. Queen, for goods purchased by her in the name of Mary Breckbill. The petition was sworn to, and a writ of attachment issued. To this petition a demurrer was filed and sustained by the court. The plaintiff had

* *Ante*, pp. 36-39.

leave to amend this petition, but neglected to swear to the new petition as amended. Defendant then moved to dismiss the attachment, on the ground that the petition does not contain the necessary averments to justify an attachment. Motion overruled, and this ruling is assigned as error.

We think the attachment should have been dismissed for two reasons :

1. Neither the original nor the amended petition asked for an attachment. This extraordinary and stringent writ should not be issued unless especially asked for in the petition. This is clearly contemplated by the Code, § 1841: "The petition which asks an attachment must be sworn to."

2. The amended petition was not sworn to. Material amendments were made to the original petition. Under these amendments it became a different petition, with additional averments ; consequently the new petition, or petition as amended, should have been sworn to. But as the proceedings relative to the attachment are independent of the ordinary proceedings on the merits, the judgment will be reversed so far as to set aside the attachment proceedings.

Judgment reversed.

C. Bates, for appellant.

J. E. Jewett, for appellee.

MERCHAND & Co v. COOK et al.

A defendant called upon as a witness by the opposite party, may, under the Code, testify to facts affecting himself, but not to facts calculated to transfer the liability from himself to the separate property of his co-defendants. In an action for a mechanics' lien on a running account for materials furnished during the progress of the improvement, in the absence of proof to the contrary, the date of the last item in the account will be regarded as "the time payment should have been made," in order to bring the account within the one year limited by the Code.

Appeal from Des Moines District Court.

Opinion by GREENE, J. Petition for a mechanics' lien filed by Lyman Cook & Co., against A. Martin and G. W. Merchand & Co., for materials furnished to said Martin in the construction of a "still-house." The materials were charged in book account, commenced more than one year before the petition was filed, but continued till about six months before suit.

Judgment against Martin, and a mechanics' lien against the property, which had been sold by Martin to Geo. W. Merchand & Co.

On the trial the plaintiff offered Martin as a witness to establish plaintiff's right to a lien on the property. To this testimony, Merchand & Co. objected, but the court overruled the objection and permitted the defendant to testify. It is claimed that this ruling is justified by the Code, §2390, which provides that "a person who has a direct, certain, legal interest in a suit, is not a competent witness, unless called on for that purpose by the opposite party." As the witness in this case was called on by the opposite party, it is urged that he was competent. It must be conceded that he was competent to testify against himself, or as between himself and the plaintiff, but we think he was not competent, either under the Code or at common law, to transfer the liability from himself upon the property of a third

party. The record shows that the claim for materials was against Martin alone. He might therefore be properly called upon by the plaintiff to establish his own indebtedness for the materials, or to establish a lien against his own property, but not to shift that liability from himself upon others. The effect of his testimony was to fix his own liability upon the property of Merchand & Co.; thus compelling them to pay his debt. Under this effect of his testimony, Merchand & Co. were as much the "opposite party" as Cook & Co., and consequently Martin could not be a competent witness unless "called on for that purpose" by Merchand & Co., as well as by Cook & Co. So far as his testimony operated to fasten the liability upon himself, it was legitimate. The judgment rendered against Martin individually, appears without error, and only that portion of the judgment which established a lien upon the property of Merchand & Co., is reversed.

It is claimed that the plaintiff below can only recover for articles furnished within one year from the commencement of the suit. The Code, § 984, limits the action to "within one year from the time payment should have been made, by virtue of the contract under which the lien is claimed." The papers in the case show that there was a running account continued during the progress of the improvement. There is nothing of record to show that "payment should have been made on any item of the account before the last item was furnished." The petition, the account, and the nature of the transaction, so far as it can be ascertained from the record, show that it was a continuous dealing, under contract for the materials; that the amount was incomplete, and not demanded or claimed as due, till the last item was furnished. Under such a continuous account for materials furnished as wanted for the improvement, we do not think each item should be regarded as a separate cause of action. The very nature of the transaction—the fact that the materials were furnished from time to time on book account without payment—shows

Sample v. Davis.

that there was an understanding between the parties that a credit of some time was to be granted to the purchaser; and from the circumstances, it may fairly be inferred that the time did not expire before the last item was furnished. We think the record in the case, aside from proof *aliunde*, can justify no other conclusion. In this particular, the court below ruled correctly; but as an interested witness was admitted to establish the lien, the judgment, so far as it creates the lien, is reversed, and the cause remanded for a trial *de novo*.

Judgment reversed.

Starr and Phelps, for plaintiff in error.

J. C. Hall, for defendant.

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SAMPLE *et al.* v. DAVIS.

Under the statute of 1846, the clerk, and not the sheriff, was authorized to receive the money paid to redeem land sold on execution.

Where money was entrusted to the sheriff, which should have been by law paid to the clerk, the sureties in the sheriff's bonds should not be held responsible for his default, in relation to that money. They are only responsible for such money as he was officially authorized to receive.

Appeal from Jefferson District Court.

Opinion by GREENE, J. This suit was commenced by A. J. Davis, on a sheriff's bond, executed August 12, 1846.

It appears that one Cunningham, purchased at sheriff's sale, for about six hundred dollars, half a section of land, in satisfaction of a judgment which he had obtained against one Depew. Cunningham subsequently sold the land to Manning and Sample; but before the term had

expired for judgment creditors to redeem, the defendant had obtained a judgment against Depew, and December 13, 1846, paid the money in controversy to James T. Hardin, as sheriff, for the purpose of redeeming the land. But as the money was not paid over to Manning and Sample, they retained the land, and released to Davis their claim to the money in the sheriff's hands. To recover this money, Davis instituted the present suit against Hardin and his securities on his official bond, and judgment was rendered in the court below against a portion of the securities.

In deciding this case, we deem it necessary to consider only one point. It is urged that the court erred in overruling defendant's demurrer to plaintiffs' petition, and in sustaining plaintiffs' demurrer to defendant's answer. This ruling of the court involved the question, "was the sheriff authorized under the statute to receive the money of Davis, for the redemption of the land?" If not the officer authorized by law to receive the money, are the securities in his official bond liable for his misapplication of it?

At the time the sheriff's bond was executed, the statute of 1846, p. 32, § 4, was in force. By this act, judgment creditors may within fifteen months after an execution sale redeem the property, "by paying to the clerk of the court from which the execution issued, for the use of the purchaser, the amount of the purchase money with ten per cent. per annum added thereto."

Instead of paying the money to the sheriff, Davis should have paid it to the clerk. The sheriff was not authorized to receive it by virtue of his office, and as Davis paid him the money without authority of law, it can only be regarded as a private transaction between the parties, Hardin became individually liable to Davis for the amount deposited with him. The fact that Hardin receipted for the money as sheriff, could not extend the liability to his securities. Those securities were only obligated to see that Hardin "diligently and faithfully discharged the

Coffin v. Kemp.

duties of the office of sheriff of Jefferson county, and safely keep and deliver over according to law to the proper person, all monies which may come into his hands by virtue of his office." These are the conditions of the bond. The duties of sheriff were such as the law defined, and the securities in the bond were obligated only for the faithful discharge of those duties. They clearly did not become responsible for the conduct of Hardin, in cases where he assumed the duties of a clerk or any other functionary. They were only accountable for his acts as sheriff under the law, and therefore the present proceeding could not be maintained against them.

Judgment reversed.

George G. Wright, for appellants.

Charles Negus, for appellee.

COFFIN *et al.* v. KEMP *et al.*

A decree by default should not be entered while there is a material motion or answer pending.

IN EQUITY. *Appeal from Wapello District Court.*

Opinion by GREENE, J. Petition filed by Jesse Kemp and Presly Doggitt against T. C. Coffin, Sarah Coffin and John Myers. Decree against T. C. and S. Coffin by default. It appears that, at the time the decree was ordered, the defendants had a motion pending for further time to answer, which does not appear to have been disposed of by the court. And it is also inferable from the record that the separate answers of T. C. and S. Coffin were on file

Petty v. Durall.

before the decree was rendered. It appearing, with sufficient certainty, that there was a motion pending upon which there was no order made, and that answers were filed before the decree by default was rendered, the decree must be so far reversed as to set the default aside.

At law, a judgment by default cannot be legally entered, when there is a plea on file in the case. *Brown v. Hollenbeck*, 2 G. Greene, 318. The same rule should obtain in equity, when a material motion or an answer is pending.

Decree reversed.

A. Hall, for appellant.

Geo. G. Wright and J. C. Knapp, for appellee.

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PETTY v. DURALL.

Consent of parties can not authorize a person not a judge of the district court, to act in that capacity.

An appeal will lie from a judgment rendered without authority in the district court.

Appeal from Monroe District Court.

Opinion by GREENE, J. The record shows that the presiding judge had, before his election, acted as attorney in the case. It was therefore agreed that Geo. May, Esq., should officiate as judge on the trial. This court has repeatedly decided that no person can be authorized to act as district judge by agreement of parties. No person can be authorized to act in that capacity, unless elected as provided by the constitution and laws of the state. The judgment having been rendered by the order of a person not authorized by law to act, it must be reversed.

But it is claimed that, as there was no legal judgment to appeal from, this court cannot entertain jurisdiction of the appeal, and that it should therefore be dismissed at the cost of the appellant.

The record shows that there was a judgment, in form, entered in the district court. Although a judgment *coram non judice*, it was still a judgment—a judgment from which an appeal will lie. By the court below, it was regarded as a valid judgment. To correct this illegal adjudication, the appeal was taken. The right to appeal is by no means limited to legal judgments. The great object of an appeal is to show that the judgment is not legal, and that it should be reversed.

This appeal must therefore be at cost of appellee.

Judgment reversed.

Wm. Penn Clarke, for appellant.

H. B. Hendershott, for appellee.

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WINCHESTER *et al.* v. COX *et al.*

In a suit upon an attachment bond, the petition should aver that the attachment plaintiff had no sufficient cause for believing the facts sworn to in the affidavit. It is not sufficient to aver that the facts were not true.
KINNEY, J., *contra*.

Appeal from Polk District Court.

Opinion by GREENE, J. Suit upon an attachment bond, for the wrongful suing out of the writ. A demurrer to the petition was sustained by the court below. It is now claimed that this was error.

The special cause of demurrer, is that the petition presents a false issue by avowing that the plaintiffs "were not

about to dispose of their property without leaving sufficient in the state to pay their debts, with intent to defraud their creditors ;" while the averment should tender the true issue, "that *there was not sufficient cause for believing* that they were about to dispose of their property," &c.

Under the Code, § 1848, if "affiant verily believe the defendant" is doing, or has done, that which will justify the attachment, he can rightfully swear out the writ ; but if there was no foundation for that belief, no cause for plaintiffs' fears that he might lose his debt, without the attachment, then the suing out would be wrongful.

If a debtor, by imprudent conduct, gives his creditors sufficient cause to believe that he intends to defraud them in any of the methods referred to by the Code, he legally subjects himself to an attachment, although, in fact, he may have had no fraudulent intentions, and may not have been disposing of his property as the creditor had reason to believe he was doing. If, on the other hand, the conduct and reputation of the debtor was that of a reliable and solvent business man, or if he was not legally indebted to the plaintiff, he might, then, assume that the attachment was wrongful, and recover damages upon the bond ; if his petition "contains a statement of facts constituting the cause of action," Code, § 1736, shown "by a fair and natural construction." Code, § 1734.

As an attachment may be issued, if the affiant verily believes the necessary facts, it follows that the suing out was legal, and not wrongful, if there was good cause for that belief ; but if the belief expressed, appears to have been without foundation or verity, the suing out might well be regarded as wrongful.

We conclude, then, that the demurrer was properly sustained.

Judgment affirmed.

C. Bates, for appellants.

B. Granger and J. D. Templin, for appellee.

LEMONDS v. FRENCH.

A cause should not be dismissed at the first term after the petition was filed, on the ground of defective notice,

A notice is not defective which called upon defendant to answer by the 12th day of the month (the 12th being the first day of the term) or on the second day of the term.

Motions, notices, and the rulings of the court in a case, are to be deemed parts of the record, under the Code.

Appeal from Marion District Court.

Opinion by GREENE, J. It appears by the record in this case that a motion was made in the court below to discontinue the cause, on the ground of defective notice; and the motion was granted.

The action of the court in discontinuing the cause is assigned for error.

As this decision was made at the first term of the court after the petition was filed, a notice so defective as to amount to no notice, would not justify a discontinuance of the case. It should have been continued, unless tried by consent of parties. Code, § 1720.

But was the notice seriously defective? It is objected that it did not specify any day certain on which defendant was required to answer. It appears that the term of court commenced on the 12th day of the month. The notice called on the defendant to answer by the 12th day of that month, or on the second day of the term. True the second day of the term was the 13th Sept., but still there was no uncertainty as to the time defendant was called upon to answer. The direction was alternative. He was not required to answer on the 12th. He might do so on that day, or on the 13th, the second day of the term. Either with or without the specific date, the defendant had until the second day of the term to appear and answer. We

Lemonds v. French.

conclude, then, that the court erred in deciding the writ defective, and in dismissing the case.

It is claimed, by appellee, that as the motion, notice and ruling of the court were not incorporated in a bill of exceptions, showing that defendant objected to the decision, that the proceeding cannot be regarded as of record; and that as they were not objected to below, they cannot be questioned here. This objection, before the Code took effect, would have been valid. But by the Code, § 1977, "all proper entries made by the clerk, and all papers pertaining to a cause, and filed therein, (except subpoenas, depositions and other papers which are used as mere evidence,) are to be deemed parts of the record." All the entries, and papers upon which this proceeding was had, are before us, as of record. There is nothing in the case to justify the presumption that the defendant acquiesced in the ruling of the court, and as the record shows that ruling to be erroneous, it should be corrected.

Judgment reversed.

S. W. Summers, for appellant.

G. G. Wright, for appellee.

DUTELL v. THE STATE.

The county judge and sheriff are authorized by the Code, to compare and correct the list of grand jurors, and the deputy sheriff is precluded by § 412, from acting thus in conjunction with another officer; consequently a list of grand jurors compared and corrected by the county judge and deputy sheriff, is not a legal grand jury, and therefore not authorized to find an indictment.

An indictment found by a grand jury not legally constituted, should be quashed; but where an indictment is duly exhibited in open court, and indorsed a "true bill," it will be presumed that the list of jurors was legally selected, unless the records of the county show to the contrary.

Error to Mahaska District Court.

Opinion by GREENE, J. Indictment for stealing a horse. Defendant moved to quash the indictment, on the ground that the grand jurors who found it were not selected according to law. The court overruled the motion, and this is assigned as error.

The list of grand jurors appears to have been compared and corrected by the judge of the county court and *deputy* sheriff, and not by the county judge and sheriff, as provided by § 1640 of the Code. Section 412 provides that the "deputy shall perform the duties of his principal pertaining to his own office, but where any officer is required to act in conjunction with or in the place of another officer, his deputy cannot supply his place." As the county judge and sheriff were required to act in conjunction in comparing and correcting the jury list and ballots, it is evident that the deputy sheriff had no more power to act than any other citizen. And as the grand jurors were not selected according to law, they had no authority to find the indictment. It should therefore have been quashed.

But it is urged by the attorney general, that the defendant cannot raise this objection after the indictment is found,

Goddard v. Beebe.

but that he should have challenged the panel of the grand jury, as provided by § 2882 of the Code. This course may be adopted with propriety by a "defendant *held* to answer for a public offence;" but can it be expected that citizens at large, against whom there is no imputation of offense, are required to appear and challenge the panel of grand jurors, or be forever precluded from raising an objection to their selection or authority to act?

It is true, as a general rule, that when the indictment is duly exhibited in open court, and indorsed "a true bill," it is evidence that it was duly found by a legal grand jury. But when the records of a county show that the grand jurors were not legally selected, and had no authority to act, it is evidence of a higher grade, and shows that the indictment could not have been found, exhibited, and indorsed by legal authority.

Judgment reversed.

W. H. SeEVERS, for appellant.

D. C. Cloud, for the State.

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GODDARD, as trustee, &c. v. BEEBE.

An action for the separate maintenance of the wife may be sustained by her trustee against the husband, on a deed of separation, in which all three were made parties, and which stipulated for immediate separation, for release of all right of dower in the husband's lands, and to keep him harmless and indemnified against all debts contracted by her—such a deed shows mutuality and consideration.

Although a husband can not contract with his wife, he may covenant with her trustee for her benefit.

A deed of separation acknowledged by the husband and wife may be good if not acknowledged by the trustee.

Appeal from Muscatine District Court.

Opinion by GREENE, J. This suit was commenced on a

deed of separation executed, by Stuart Beebe, and Jane, his wife, of the first and second parts, and P. B. Goddard, as trustee, of the third part. Among other things, the deed stipulated that S. Beebe should pay to Jane, during her life, the annual sum of eight hundred dollars; and, in default of such payments, the deed authorized judgment against Stuart, at the suit of Goddard, as trustee, for the sum of ten thousand dollars. The payment of \$800 per annum was to be made monthly, commencing February 1, 1848. Petition avers default of payments from November 1, 1850, to the commencement of suit, May 4, 1853. A copy of the deed of separation is made a part of the petition. A demurrer was filed to this petition and sustained by the court. It is contended that there was no good cause for the demurrer, and that it should have been overruled.

1. As a strong cause of demurrer, it was urged that an action cannot be maintained upon the deed, and that it is void for want of consideration. The deed appears to have been prepared with much care and professional skill. The relations and undertakings of the respective parties are distinctly observed, and clearly expressed. The liability of the husband to pay the stipulated sum for the maintenance of the wife, under their agreed state of separation, is unequivocally expressed; and, as the instrument contains every essential requisite to legal validity, as it is in writing, and between parties capable to contract and to be contracted with, in consideration of mutual objects which may be contracted for, such as maintenance and release from the wife's debts, as it was duly executed and acknowledged by the parties in interest, we can see no good reason why the action should not be sustained by the trustee for the use of the wife.

But it is objected that a deed must be founded upon a good and sufficient consideration, and that the deed in this case shows no consideration from the wife to the husband. The deed states that the separation was "mutually agreed to," and "that in consideration of the covenants and pre-

visions made by Stuart Beebe, she, the said Jane, hath, and by these presents doth remise, release," &c., all right of dower in her husband's lands, and agrees to keep him harmless and indemnified against all debts contracted by her. In consequence of the "unhappy differences" referred to in the deed, both husband and wife considered separation desirable. In this there was mutuality. The considerations for the stipulated maintenance, are not only the release of dower, and from liability to pay her debts, but there was also that universal consideration at law, which requires the husband to furnish suitable support for his wife. Their voluntary and mutual separation from each other cannot abolish that obligation.

2. Again, it is urged that the deed has no validity, because it is a rule of law that the wife has no capacity to contract, as her legal existence is merged into that of her husband. A covenant with her is, in legal effect, with himself. This objection is removed by the intervention of the trustee, who contracts for her benefit. It is for that reason he was made a party to the deed.

3. But it is urged that the deed was not acknowledged by the trustee, and that it is therefore void. As the deed was duly acknowledged by the husband and wife, and contained no covenants, grants or concessions from the trustee, there was no necessity for his acknowledgment. With as much propriety might it be said that a deed should be acknowledged by the grantee.

Many decisions are cited by counsel, in support of the demurrer, but we cannot regard them as strictly applicable to the case at bar, while the authorities in support of such deeds are numerous, appropriate and reliable, not only from American but also from English courts. *Lee v. Thurlow*, 9 English C. S. R., 174; *Baynou v. Batty*, 21 *ib.*, 295; 13 Ves., 443; 18 *ib.*, 99; 2 Bright, 383, § § 16 to 37; 2 Blacks. R., 848, 1016; 2 P. Wms., 502; 5 Day, 47; 7 Serg. and Raw., 500; 3 Barr., 100; 7 *ib.*, 411; 8 John., 72; 3 Paige 483; 14 Ohio 257.

Reed v. Beazley, 1 Blackf., 97, decides all the important points raised in this case. It affirms the doctrine supported by a long train of English decisions in favor of such deeds, and commends the policy which would enforce the husband's promise to provide for the maintenance of his wife. In that case, the husband bound himself by deed, to pay a certain sum annually for four years, to a trustee, named as the third party in the deed, for his wife's maintenance; reserving to himself the right to deduct from the amount whatever he should be obliged to pay for debts which she might subsequently contract; and it was held that this contract was obligatory at law upon the husband.

In the case at bar, the deed has no such reservation in relation to the debts of the wife, nor is it pretended that the husband had been called upon to pay any such debts. We must presume from the pleadings, that she had performed her undertaking in the deed, by keeping "him harmless and indemnified against all debts of her contracting." If she had failed in that particular, if he had been called upon to pay any debts subsequently contracted by her, it would have been a legitimate item of set-off against her claim. In all deeds like the present, the law would give the same protection and security as the husband reserved to himself in *Reed v. Beazley*, and therefore such a reservation in a deed is not necessary, and can give it no additional force or validity.

In some of the decisions, referred to in support of the demurrer, it appears that the trustee named in the deed gave an indemnity against the debts of the wife; it is therefore inferred by counsel, that as the trustee in the present deed gives no such indemnity, the deed should be adjudged a nullity. Such an inference is not authorized by the premises. No case has been pointed out to us in which the deed was declared void for the want of such indemnity; nor does it appear that the cases cited would

not have been equally strong against the husband, if there had been no such indemnity.

In 2 Atk., 511; 10 Ves., 191; 13 ib., 443; 18 ib., 99; 2 East. 283; in each case, decree was rendered against the husband, for the wife's maintenance, although no indemnity was given by the trustee. These English authorities are well indorsed by a long train of American decisions. And it may be worthy of remark that no state furnishes a more corroborative list than Pennsylvania, within which the deed in the present case was executed. It appears to have been prepared with particular reference to the laws and decisions of that state. As the laws of a state enter largely into the contracts made under them, this deed derives peculiar favor and validity from the decisions of that state.

But it is objected that the more recent decisions in New York are against the validity of such deeds, and in proof of this, we are referred to *Beach v. Beach*, 2 Hill, 260; *The People v. Mercein*, 3 ib., 399.

The points decided in *Beach v. Beach* are in no particular applicable to the case at bar. The deed in that case contained a covenant that the wife might prosecute suits in her own name, or in the joint name of herself and husband, and that he would not interfere with such suits. She subsequently commenced an action of slander, in their joint names, for words spoken of her after the deed was executed; and it was held that a release given by the husband after the suit was commenced, might be pleaded in bar to the action; assuming that at law no agreement between husband and wife will be recognized, so far as it changes their legal capacities and characters. And, still, in that very case, it is conceded "that it may be considered at present as settled, that these deeds, when not contemplating a future separation, are valid, so far as relates to the trusts and covenants by which the husband makes a provision for the wife," &c. 1 Jacobs on Husband and Wife, 157, (note.) A recent English decision is also referred to, with approba-

tion, in which Lord C. J. Denman, after reviewing all the cases on the subject says : "If I could venture to lay down the principle, which alone seems to be safely deducible from all these cases, it is this : that when a husband has, by his deed, acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her maintenance during separation, on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant." *Jones v. Waite*, 5 Bing. (N. C.) 341. There is nothing, then, in the text of *Jacobs*, in the opinion of Denman, nor in the questions decided in *Beach v. Beach*, that militates against the obligations of the husband in the present deed.

The case of *The People v. Mercein*, 3 Hill, 390, was on *habeas corpus*, by a husband, to recover possession of his infant daughter, from his wife and her father. The validity of an agreement in relation to the care and keeping of the child, was involved in the decision, and it was simply held that the husband could not, by such an agreement, alienate to the wife his right to the custody and care of their children. The agreement made no provision for separation or maintenance, but Judge Cowan takes occasion to animadvert rather severely upon deeds of separation ; and yet he observes : "I am aware that a separate maintenance may be settled by the husband on the wife, and that incidentally they may covenant for the separation of their persons ; and that courts, both of law and equity, have sanctioned such arrangements by carrying them into effect." He soon after declares that "the doctrine of separate maintenance cannot be made to bear upon the agreement in question." Thus clearly showing that that case has no analogy to the present.

Called upon as we are to decide this case upon principles of law as settled by the authorities, we cannot for a moment question the validity of the deed, and the obligation of the husband to furnish the maintenance therein stipulated ; but at the same time it must be conceded, that such articles of separation, so far as they encourage

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separation, should be discountenanced by the courts. They are calculated to weaken at least, and too frequently evade the obligations of the marriage contract. When parties are so unfortunately constituted that they cannot live in peace and safety together; when ungovernable passions characterize their intercourse and lead to corporal abuse and insecurity of life, a separation would seem to be necessary; and in such a case an amicable deed for maintenance, for release of dower and indemnity against debts of the wife's contracting, might be regarded as especially desirable for both parties. As there could be no concord or safety in union, such a deed might produce amity and security in separation. But in such state of separation the legal obligations and restrictions resulting from the relation of husband and wife, should be strictly observed, especially so far as they affect others. Notwithstanding the deed, their marriage contract is not dissolved in any of its legal conditions or obligations. The deed seems only to adjust those conditions and obligations so far as they relate to themselves, and thus avoids the annoyance, expense and delay of judicial action.

We conclude, then, that where such a deed is not calculated to encourage separation between husband and wife, when the stipulations are mutual and in accordance with their marital rights; when it shows an amicable adjustment of those rights between the husband and the wife's trustee, at least so far as her maintenance is concerned, it should be enforced.

Judgment reversed.

S. Whicher, J. Butler and H. O'Connor, for appellant.

J. Scott Richmond, for appellee.

Bogy v. Rhodes.

BOGY v. RHODES.

Where R. sold to B. a quantity of wood delivered on a boat at a landing, at a stipulated price per cord; and where the boat containing the wood was taken from the landing by B., without ascertaining the exact quantity of wood, and while towing the boat from said landing it was sunk and the wood lost: held, that B. had possession of the wood, and was liable to R. The rule that a sale of property is not complete, when any thing remains to be done by the vendor, such as measurement, in order to ascertain the quantity, &c., applies only to cases of constructive delivery.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This action was commenced before a justice of the peace, on an account for thirty-three cords of wood. Judgment was rendered in favor of plaintiff, Rhodes, for thirty cords of wood at two dollars a cord. The case was taken to the district court on writ of error; judgment in favor of Rhodes for \$61 50.

It is claimed that plaintiff should not have recovered, because the testimony does not show a delivery of the wood.

It appears that the wood was furnished according to contract, at a landing about six miles below Dubuque, on board of a flat boat; that thirty cords were delivered from the landing on board of the boat, and that four or five wagon loads, in addition, were put on the flat boat; that the plaintiff was to have two dollars per cord for the wood delivered on the flat boat at the landing; that defendant was to take it from said landing with his ferry boat; that he came for the wood accordingly, and while towing the wood boat from the landing to Dubuque, the boat was sunk and all the wood lost.

It is claimed that as the quantity of wood was not fully ascertained by measurement, the right to the property was not changed, and therefore the loss should fall upon the

Bogy v. Rhodes.

plaintiff. The evidence clearly shows that there was at least thirty measured cords of wood delivered upon the boat, besides four or five wagon loads, and that the wood was to be delivered to the defendant at the landing. It follows, then, that the defendant became liable for the wood the moment he took possession and started with it from the landing. The fact that he neglected to see the wood measured, before starting, could not remove his liability.

We fully concede the doctrine that on a sale of property, when any thing remains to be done by the vendor, in order to ascertain the value, quality or quantity, the delivery is not complete.

But this rule is applicable only to cases of constructive delivery and cannot prevail against the vendor of the wood in this case. He had caused thirty cords of the wood to be measured before it was placed upon the flat boat. True, the exact quantity of the four or five additional loads was not ascertained, but the plaintiff had taken actual possession of all. It was all actually delivered to him, and therefore the rule above referred to is not applicable to his case. In *Macambee v. Parker*, 13 Pick., 175, it was held that, where a quantity of goods bargained for at a certain rate, is actually delivered, the sale is complete, although the goods are to be counted, weighed or measured, in order to ascertain the amount to be paid for them. See also *Sumner v. Hamlet*, 12 Pick., 76, 82.

Judgment affirmed.

Hempstead and *Burt*, for appellant.

L. Clark, for appellee.

BROBST v. THOMPSON.

BROBST v. THOMPSON.

In a proceeding to foreclose the equity of redemption to land held by tax title, a party holding the sheriff's certificate of purchase of the same land on execution sale, is sufficiently interested to appear as defendant.

Where the record does not show to the contrary, it will be presumed that the court acted in accordance with the Code.

If the bill of exceptions does not purport to give all the evidence in the case, it will be presumed that the decision was justified by the testimony before the court.

Appeal from Marion District Court.

Opinion by GREENE, J. Joseph Brobst filed his petition in the district court against S. M. Thompson, to foreclose the equity of redemption, to certain land which he held by tax deed. Defendant's answer to the petition was demurred to, and the demurrer sustained. As defendant failed to amend or file a new answer, judgment was rendered against him by default, and thereupon Fish and Dunlap filed their motion for leave to come in and defend the suit, on the ground that they had purchased the land at sheriff's sale. Leave was granted, and they filed a demurrer and answer to the petition. The demurrer was overruled, and thereupon plaintiff's demurrer to the answer was sustained, and a new answer filed averring that no tax was legally levied upon the land in question. Upon this averment, issue was joined and the petition dismissed.

1. It is objected that Fish and Dunlap had no right to appear against the suit, for the reason, that they had only a sheriff's certificate of purchase, which was liable to be defeated by redemption. We think the court did not err

Brobst v. Thompson.

in granting them leave to appear as defendants. They were at least interested in the land; and especially interested in having no tax title foreclosed against it. Their interests were adverse to the relief sought by the plaintiff, and therefore under § 1678 of the Code, they might be joined as defendants. Section 1684 would also justify this ruling of the court. It was only necessary for them to show that they were interested in the subject matter of the suit. This was sufficiently shown by their purchase of the same land at sheriff's sale.

2. It is claimed that Fish and Dunlap should not have been permitted to defend for another reason. The Code, § 506, will not entitle the owner to defend "unless he has paid or tendered the amount directed, or shows that no tax was levied on the land, or that he had paid the taxes." Their answer expressly averred one of these conditions, and upon that point issue was joined, and the court found according to the averment of the answer. It does not appear at what particular time that defense was shown to the court. That fact may have been shown to the court, before the first answer of Fish and Dunlap was filed. As the record does not show to the contrary, it must be presumed that the court acted in accordance with the Code.

The bill of exceptions does not purport to give all the evidence submitted in the case. If we were to decide the case upon no other evidence than that referred to in the bill of exceptions, and if we could presume that no other testimony was given on the trial, we should decide that the decision was erroneous; for the evidence of record in the case does not show that there was no tax levied upon the land. Still, every legal intendment must favor the proceeding below; and unless the record shows to the contrary, it must be presumed that the court below ruled correctly. *Dunham v. Benedict*, 1 G. Greene, 74.

It was decided by this court, in *Napier v. Wiseman*, 3 G. Greene, 246, that matters of fact decided by the court

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below, will not be disturbed when the bill of exceptions does not purport to give all the evidence.

As the record in this case shows nothing to the contrary, it must be presumed that the court below had proof sufficient to justify the decision.

Judgment affirmed.

W. Penn. Clarke, for appellant.

J. E. Neal, for appellee.



REDDAN v. THE STATE.

Where the first indictment was mislaid, a second indictment was found for the same offense, and on motion quashed, and thereupon the first indictment was found: held, that the second indictment did not supersede the first.

An indictment for an assault with intent to inflict a bodily injury, should aver in substance that no considerable provocation appeared, or that the circumstances of the assault showed an abandoned and malignant heart. An indictment should charge the facts and circumstances constituting the offense in substantial compliance with the law defining the crime.

Error to Dubuque District Court.

Opinion by GREENE, J. Indictment for an assault with intent to inflict a bodily injury. When the case came on for trial, the indictment was said to be lost, and another indictment was found for the same offense. This second indictment was considered defective, and quashed. In the meantime, the lost indictment was found; and upon this, the plaintiff in error was tried and found guilty. To these proceedings, and to the sufficiency of the indictment, objections were urged, and overruled in the court below.

1. It is claimed that the court erred in deciding that the

finding of a second indictment did not supersede the first ; upon which defendant was tried. As the first indictment, was thought to be lost, it seemed necessary that the grand-jury should present another indictment for the offense ; but as the second indictment was quashed, and the first indictment found, the first was fully reinstated, and in no way impaired by the proceeding under the second. If both had been before the court, at the same time, for the same offense, that fact might have been pleaded. *The State v. Whitmore*, 5 Pike, 247.

After the second indictment was quashed, the first stood alone ; and therefore it could not be objected that there was another indictment pending for the same offense.

It was held in *The People v. Monroe*, 20 Wend., 108 that the mere finding of a second indictment is not, *per se*, a supersedeas of the first. We conclude, then, that the court very properly overruled this objection.

2. The first indictment was objected to on the ground that the offense is not charged in the language of the statute under which it was found. *Rev. Stat.*, 169, § 20. The crime, under this statute, consists of an "assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, when no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart," &c. The indictment does not, either in substance or form, charge the offense as it is defined by law. It does not allege that there was no considerable provocation, nor that the circumstances of the assault showed an abandoned and malignant heart. There is no kind of an averment in reference to provocation, or the circumstances of the assault, or the condition of the heart ; nothing in the indictment that could indicate the offense defined in that section of the statute to which we have referred. It cannot, therefore, be considered a good indictment under the statute, for no "indictable offense is clearly charged therein." *Rev. Stat.*, 153, § 46.

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It is urged by the attorneys for the State, that as one count in the indictment charges the assault to have been "feloniously and maliciously," "wilfully and wickedly" committed, the averment is in every respect equal to the words used in the statute. They may express an equal, if not a much greater degree of turpitude, but they do not, in any particular, characterize the offense as it is defined by statute. There is no analogy in language, or in the facts. The attorney must have had in his mind the law of some other state or country, where the facts and circumstances constituting the offense are materially different from those defined by our statute.

We do not pretend that an indictment should follow the very language of the statute ; but it should charge the facts and circumstances constituting the offense, in substantial compliance with the law defining the offense. *Buckley v. State*, 2 G. Greene, 162 ; *Nash v. State*, ib., 286 ; *State v. Chambers*, ib., 302.

The indictment in the present case is so foreign to any law in this state, defining the offense, that we must pronounce it bad.

Judgment reversed.

J. Burt, for plaintiff in error.

D. S. Wilson and *P. Smith*, for the State.

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The indictment in the present case is so foreign to any law in this state, defining the offense, that we must pronounce it bad.

Judgment reversed.

J. Burt, for plaintiff in error.

D. S. Wilson and *P. Smith*, for the State.

ORTON v. THE STATE.

On a trial for an assault, articles of apprenticeship may be given as evidence to the jury, in order to show the relation of master and apprentice between the person assaulted and the object in dispute.

A master may do that to protect his apprentice, which, under other circumstances would be an assault or give considerable provocation for one.

An informal or ambiguous verdict may be corrected or explained at any time before the jury is discharged.

The district court has concurrent jurisdiction over all offenses cognizable before a justice of the peace.

A simple assault is included in the charge of an assault with intent to commit a bodily injury.

Error to Lee District Court.

Opinion by GREENE, J. Orton was indicted for an assault upon Terrel, and on trial found guilty. It is now contended that several errors were committed below in the progress of the trial.

1. It is claimed that the court erred in admitting in evidence the indentures of apprenticeship, which showed that the brother of the defendant was entrusted to Terrel as an apprentice, by his father. As the bill of exceptions shows that the difficulty between Orton and Terrel grew out of an attempt by Orton to take away his brother, the apprentice, this instrument appeared to be relevant to show Terrel's rights and relation to the boy, in order to justify his efforts to defend and retain him. By showing, that the powers, liabilities and duties of the master, Terrel, were towards the object in dispute, the same as those of a parent towards a child, acts would be justified on the part of the master which would, in the absence of such relation, show him to be the assailing and perhaps the guilty party. A master may do that to protect his apprentice, which another party could not do without being the assailant, or giving considerable provocation for an assault. In this

instance it seemed material that the true relation between the person assaulted and the object in dispute should be fully understood by the jury. We conclude, then, that the court did not err in admitting the instrument in evidence.

2. It is claimed that the court erred in overruling defendant's motion in arrest of judgment. In support of this motion, it is urged, that the court altered the verdict of the jury.

It appears by the bill of exceptions that the jury returned the following verdict: "We, the jury, find the defendant guilty of the second charge in the indictment." The court, on receiving the verdict, said, "Gentlemen, let us understand this verdict; you find on the simple assault?" The jury assented. Thereupon the court added to the verdict, in the presence of the jury, the following words, "the simple assault."

As the second count in the indictment charges a "simple assault" only, the verdict of the jury justifies the assumption that they found the defendant guilty on the second count in the indictment. The judgment in the case is in harmony with this view of the verdict. The words added to the verdict in the presence of the jury, were in accordance with their explanation of the verdict. The addition of those words was justifiable. They did not change; they simply explained the intention and meaning of the verdict. Where a jury return to the court an informal or ambiguous verdict, it is the duty of the court to have it corrected in form, or have the ambiguity explained by the jury, at any time before they are discharged. *Wright v. Phillips*, 2 G. Greene, 191.

3. But it is objected that a simple assault is not indictable, as the offense is cognizable before a justice of the peace. Code, § 3322. Although justices of the peace have jurisdiction over such offenses, it does not, therefore follow, that the district court is divested of such jurisdiction. In such a case the jurisdiction is concurrent.

Orton v. The State.

The Code provides that the district court shall exercise general jurisdiction, both civil and criminal, "when not otherwise provided by law," § 1575. That jurisdiction can be taken away only by express words. *Wright v. Marsh*, 2 G. Greene, 94.

Under the constitution, the district court has jurisdiction in *all* civil and criminal matters arising in their respective districts. See art. 5, § 4. The general and concurrent extent of that jurisdiction has been repeatedly before this court. *Chapman v. Morgan*, 2 G. Greene, 374; *Nelson v. Gray*, *ib.*, 397; *Hutton v. Drebilbis*, *ib.*, 593.

The indictment contains three counts, in each of which an indictable assault is charged, under which a simple assault might be included. A defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. Code, § 3039. A simple assault is necessarily included in the charge of an assault, with intent to commit a bodily injury, and therefore the defendant might have been found guilty under either count.

Judgment affirmed.

J. C. Hall and *C. H. Phelps*, for plaintiff in error.

Joseph M. Beck, for the state.

Bruce v. Luck.

BRUCE *et. al.* v. LUCK.

Where the statute of limitation is pleaded in bar to an action, a replication, resting upon the facts, that the plaintiff was a non-resident, and that the contract was made in another state, is demurrable.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This suit was commenced by Thomas Bruce and others, against L. P. Luck, on the transcript of a judgment, rendered by a justice of the peace, on a promissory note, in the state of Missouri, in 1834. The defendant pleaded the statute of limitations of 1843. To this the plaintiffs replied, that they and the defendant were not residents of this state at the time the note was made, and that although the defendant had been for many years a citizen of Iowa, still they, the plaintiffs, had continued to reside in Missouri; that said note and judgment had not been subject to the laws of Iowa until the commencement of this suit; and that therefore their right of action ought not to be barred by defendant's plea. Defendant's demurrer to this replication was sustained, and judgment rendered in his favor. On this ruling, errors are assigned.

It is objected that the statute of limitations is not applicable to foreign contracts or notes, and non-resident plaintiffs. If the laws of other states are to prevail over the remedial statutes of our own state,—if the law of the place where the contract was made is to govern in all matters affecting the remedy, there would be good reason for this objection.

The doctrine seems to be settled beyond controversy, that the *lex fori* must prevail in all matters merely remedial. In this connection, no rule is better settled than that the statute of limitations of the state in which the action is brought, is to prevail; and not that of the state in which the contract was made. *Hawkins v. Barney*, 5 Peters,

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457; *McElmagle v. Cohen*, 13 ib., 312; *Ward v. Hallam*, 2 Dallas, 217; *Richards v. Bickley*, 13 Serg't & Rawle, 395; *Leroy v. Crownenshield*, 2 Mason, 151; *Nash v. Tupper*, 1 Cains., 403; *Lincoln v. Battelle*, 6 Wend., 475; *Ruggles v. Keeler*, 3 John., 263; *Bissell v. Hall*, 11 ib., 168; *Cartier v. Paige*, 8 Ver., 150; *Hinton v. Towns*, 1 Hill, (S. C.), 439; *Graves v. Graves*, 2 Bibb, 207; *Egberts v. Dibble*, 3 McLean, 86.

It is not pretended that the defendant in this case was not a resident of the state from the time the statute commenced to run, until the limitation had expired. The replication rested entirely upon the facts that the plaintiff had been a non-resident during that time, and that the contract was made in another state. So far as those facts are concerned, we are fully confirmed in the opinion that they can not remove this case from the effect of the statute.

Judgment affirmed.

Hempstead & Burt, for appellant.

L. A. Thomas, for appellee.



KARRICK V. PRATT'S EXECUTORS.

A foreign executor has no authority to commence a suit in this state without first filing a bond, and letters testamentary, as required by Laws of 1845.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This was an action of assumpsit, commenced in 1851, by Simon A. Greagnon and R. Pratt, executors, &c., of E. F. Pratt, against Geo. Ord

Karrick, on a promissory note. To the declaration, the defendant pleaded specially, that the plaintiffs ought not to have or maintain their action, for the reason, that at the time the action was commenced, no letters testamentary had been granted to, or taken by the plaintiffs; and that no copy of letters or bond had been filed, as required by statute, &c. The replication admitted the plea, but averred that letters and a bond had been subsequently filed, &c. Demurrer to the replication overruled, and judgment rendered for the plaintiffs.

It is urged that the demurrer should have been sustained, as foreign executors, or administrators are required by statute, before entering upon the discharge of their duty, to make out a good and sufficient bond, and to file with the judge of probate their letters testamentary, or an attested copy thereof. Laws of 1845, 49, 50, §§ 1, 2. These were necessary qualifications before they were authorized to commence and prosecute suits in this state. As a general rule, a foreign administrator, or executor cannot maintain an action without the authority of a court of probate in the state where the debtor resides. Story's Con. of Laws, §§ 512, 513; *Goodwin v. Jones*, 3 Mass., 513; 11 ib., 313; 2 New Hamp., 292; 4 Ran., 158.

As this rule is modified by our statute, it is claimed that it is not applicable to this state. But surely the statute to which we have referred is applicable, and should be observed. We are of the opinion that the executors had no authority to commence this suit, without having first complied with the directions of the statute; and that the court below erred in overruling the demurrer.

Judgment reversed.

B. M. Samuels, for appellant.

Geo. L. Nightingale, *D. S. Wilson*, and *P. Smith*, for appellees.

Smith v. Carroll.

SMITH v. CARROLL.

Rails, laid up in a fence inclosing a field, or a portion of a field, are a part of the freehold, although the fence is not staked with stakes sunk into the ground.

Appeal from Jackson District Court.

Opinion by GREENE, J. This was an action of trespass, commenced by John G. Smith against John Carroll, for tearing down a fence, and hauling away the rails. Verdict and judgment for the defendant. The only error assigned in the case, is in relation to the instructions given by the court to the jury. The court charged as follows: "That if they believe, from the testimony, that the fence in question was not staked with stakes sunk or fastened into the ground, it was not a part of the freehold, so as to enable the plaintiff to sustain an action of trespass, and they must find for the defendant."

In this charge to the jury, the court seemed determined to adhere, without exception or reservation, to the old maxim: "*Quicquid plantatum solo, solo cedit.*" Whatever is affixed to the soil, belongs to the soil. Under this maxim, a general rule has been observed from remotest antiquity, that a chattel does not lose its personal nature, unless fixed in or to the ground, or some foundation which in itself forms part of the freehold. But even this rule, old and universal as it is, admits of some qualifications. The strictness of the rule has not only been materially relaxed between landlord and tenant, between heir and executor, but it has also been modified, to some extent at least, in its application to peculiar cases, circumstances, and customs.

It is often difficult to decide what articles are so annexed to the soil as to pass with the freehold. In such cases, the best test appears to be, whether the removal can be effected

without substantial injury to the freehold. *Avery v. Chislyn*, 3 Ad. and E., 75.

No one will doubt that a farm inclosed, is more valuable than the land would be without a close. To remove a fence from a freehold, to destroy the close, must be a substantial injury; and therefore a fence which forms a close, or any part of an inclosed place on the premises, should be regarded as a part of the freehold. It makes no difference how the fence is constructed, or of what material. If of rails, it may or may not have stakes sunk or fastened into the ground. The only question to be decided is: Are the rails so laid or arranged as to constitute a fence?

Under the ruling of the court below, a very large portion, and perhaps the greater portion of the fences in this state, would be rejected from the freehold. The consequences would be serious, and often result in great wrong and injustice.

In *Burleson v. Teeple*, 2 G. Greene, 542, this court decided that a rail fence built upon the public land by mistake, passed with the freehold to the purchaser from the government, although the rails had been detached from the soil by a wrong doer. The same doctrine was held in *Seymour v. Watson*, 5 Blackf., 555. In this case, the general principle is recognized, that a fence, which incloses a field, is necessary for the use and occupation of the ground, and cannot be removed without injury to the freehold. 2 Kent's Com., 342; 2 Bacon's Ab., 63.

The quality of the fence, or manner in which it is constructed, cannot change the principle. If it is a fence inclosing a field, it becomes a part of the freehold. It has been held, and we think with good reason, that the fencing materials on a farm, which had been used as part of a close, but temporarily detached, were a part of the freehold, and passed with the farm to the purchaser. *Goodrich v. Jones*, 2 Hill, 142.

We conclude, then, that although the instruction given

Whitmore v. Bowman.

in this case may have been justified by a strict, technical, and unqualified construction of the maxim to which we have referred, still, it is not consistent with the reason and leading object of that maxim ; it is not in accordance with the rights and justice of this case, and is in direct conflict with the authorities in point, and with the condition and customs of the country.

Judgment reversed.

P. Smith, and D. T. Spurr, for appellant.

F. Bangs, for appellee.

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WHITMORE *et al.* v. BOWMAN.

In an action for damages to personal property, the articles should be so specified as to inform the defendant of the extent of the action, and proof to be adduced against him ; and hence when the petition claimed for damages to " furniture, &c.," it was error to admit proof for injuries done to coffee, sugar and apples.

▲ witness should be required to state facts, and not his opinion, except on questions of science, skill or trade, in relation to which he is an expert.

Upon questions, wherein the jurors are as well qualified to form an opinion as the witness, the opinion of the latter should not be received in evidence.

As a general rule, witnesses are to state such facts as are relevant to the issue, and from those facts the jury are to draw their own conclusions.

▲ public ferryman is regarded at law as a common carrier, and is bound to provide suitable boats, landings, fastenings and fixtures.

Appeal from Jackson District Court.

Opinion by GREENE, J. This action was commenced by Jacob Bowman against Whitmore and Grant, for the loss of a horse, and damage to harness, furniture, &c., at the defendants' ferry, under the charge of gross negligence in the management of their ferry boat. The answer denies

negligence, and alleges the loss to have been occasioned by the carelessness and negligence of plaintiff's son, who had the horse and wagon in charge. Issue joined upon the facts; trial by jury, and a verdict and judgment for the plaintiff.

1. On the trial, evidence was admitted in relation to articles having been lost and destroyed, which were not specified in the petition. To this evidence defendants objected, on the ground that a recovery could be had only for such articles as the petition designated. We think this objection should have been respected by the court. Such articles as coffee, sugar and apples, are not sufficiently designated under the term, "furniture, &c."

In an action for damages to personal property, the articles should be so specified that the defendant may be informed as to the extent of the action and proof to be adduced against him. 2 Greenl. Ev., §§ 255, 256 278; Bacon's Ab., 507; *Holmes v. Hodgson*, 17 Eng. C. L., 109.

But it is claimed that the variance between the petition and evidence was not material, because the defense set up charged the loss to have been occasioned by the negligence of plaintiff's son or agent. True,* by not denying the loss, and seeking to avoid damages; by charging the loss to have been the result of plaintiff's own negligence, he admitted there was a loss, as set out in the petition. But he did not confess a loss of articles that were not described in the petition. He admitted the loss of "a horse, furniture, &c," but did not admit a loss of coffee, sugar and apples. Nor can the meaningless letters, "&c.," be extorted into a designation of those commodities.

2. It is objected that the court erred in permitting plaintiff's witnesses to give, in evidence, their opinions as to the amount and value of the damages done to the goods. This objection is not without foundation. As a general rule, witnesses should state facts, and not opinions. They should give, in evidence, what they have seen and know in relation to the issue pending, and from those facts

the jury will form an opinion. To this rule, however, there are many exceptions. These exceptions are applicable mostly to questions of science, skill or trade, and to persons who are expert in relation to those questions. But in no case should a witness be permitted to express an opinion as evidence, where the jury, to whom the facts are submitted, are supposed to be equally well qualified to form an opinion. Unless this practice should prevail, it must follow that witnesses, subject often to strong feelings of prejudice or partiality, may dictate a verdict to the jury.

In support of this general rule, and the exceptions, many authorities might be cited. 16 Ohio, 513; 7 Wend., 78; 17 ib., 160; 19 ib., 576; 10 Ala., 460, 469; 3 New Hamp., 349, 364, 366; 1 Greenl. Ev., § 440; 5 Phil. Ev., 112, note 173; 1 G. Greene, 170.

These authorities clearly indicate that the legal course to be pursued in such cases, is to lay before the jury such facts as are relevant to the issue, and from these facts let the jury draw their own conclusions.

3. The court charged the jury that the defendants, with their ferry, were regarded at law as common carriers, and bound to provide suitable boats, fastenings, landings and fixtures, of all kinds, for the safe transport of persons and teams. This instruction is assigned as error, and it is urged that ferrymen are not bound to observe the same diligence, and are not responsible for the same ordinary negligence, as would attach to a common carrier; for the reason that the owner, or his agent, usually accompanies the goods, and becomes himself responsible for the care of them. The doctrine seems to be well settled, that ferrymen are to be regarded as common carriers, and are responsible for the same degree of care and diligence in the performance of their undertakings. It would seem to be bad policy to relax this rule. If negligence and irresponsibility should be countenanced in the management of fer-

Whitmore v. Bowman.

ries, there would be much less security for life as well as property.

The authorities appear to be, without conflict, that a public ferryman should be regarded at law as a common carrier. *Babcock v. Herbert*, 3 Ala., 392; *Ferry Co. v. Clark*, Riley, 300; *Smith v. Seward*, 3 Barr., 342.

In *Cohen v. Hume*, 1 McCord, 439, it is decided that as soon as a carriage is fairly on the drop or slip of a flat, it is in the ferryman's possession, and he is liable for any damage that happens to it or to the horses, although they were driven by the owner's servant.

It was held in *Pomeroy v. Donaldson*, 5 Miss., 36, that a ferryman is a common carrier, and liable not only for gross negligence, but for all losses, except such as are occasioned by the act of God, or the enemies of the country.

Even the owner of a private ferry, when no public road has been established, may so use his ferry as to subject himself to the liability of a common carrier, if he undertakes, for hire, to convey persons generally, with their teams and goods, across the river. *Littlejohn v. Jones*, 2 McMullan, 365.

We conclude, then, that the court charged correctly upon this point; but a trial *de novo* must be awarded upon the other two points.

Judgment reversed.

Platt Smith, for appellant.

J. W. Jenkins and *Van H. Higgins*, for appellee.

Hudson v. Plank Road Co.

HUDSON v. PLANK ROAD CO.

Where the petition seeks to recover an amount subscribed to the capital stock of a plank road company, a copy of the subscription paper should be annexed to the petition.

Appeal from Des Moines District Court.

Opinion by GREENE, J. This suit was commenced by the Burlington and Louisa County Plank Road Company, against Silas A. Hudson, to recover the amount subscribed by him to the capital stock of the company. The defendant demurred to the petition on the grounds that a copy of the instrument, on which the action is founded, is not filed with, or annexed to, the petition. This demurrer was overruled, and judgment rendered against the defendant for the amount claimed.

Defendant appealed, and now seeks to reverse the judgment, and claims that the court erred in overruling the demurrer. The Code, § 1750, requires that, "When a pleading is founded upon a written instrument or account, a copy thereof must be annexed to such pleading, or it will be a sufficient ground for a demurrer thereto."

This action was necessarily founded upon the subscription paper, to which defendant subscribed one share of stock. The petition was founded upon that, for that alone created the liability. Hence a copy of that instrument or subscription paper, should have been annexed to the petition. Without that copy, the petition was demurrable. The demurrer should have been sustained.

Judgment reversed.

M. D. Browning and J. Tracy for appellant.

J. C. Hall and L. D. Crocker, for appellee.

CREW *et al.* v. McCLUNG.

Where a demurrer to a petition is only applicable to the attachment proceeding, an erroneous ruling, in relation to such demurrer, cannot affect the judgment on the merits.

If the requisite facts for an attachment are clearly stated in the petition, it is not necessary to follow the exact language of the Code.

When the answer distinctly traverses the material averments in a petition, so far as they relate to the attachment, that issue of fact, if desired by the defendant, should be regularly tried and determined.

It is an error to render judgment upon a debt not due, without the consent of the debtor, although property may be attached to secure such a debt.

Appeal from Clinton District Court.

Opinion by GREENE, J. This suit was commenced by attachment, against Thomas Crew and others, on three promissory notes. A demurrer to the petition, and a motion to dissolve the attachment, were overruled. Judgment was rendered in favor of plaintiff for the full amount of the notes, although one of the three notes had not matured, at the date of the judgment.

1. The appellants seek to reverse the judgment under the assumption that the court erred in overruling the demurrer. As the causes assigned for demurrer are applicable only to that part of the petition which relates to the attachment branch of the case, that ruling should not disturb the judgment on the merits.

2. It is urged that the motion to dissolve the attachment, was erroneously overruled. The reasons assigned for this motion, are applicable to that part of the petition which relates to attachments for debts not due, and on which nothing but time is wanting, to fix an absolute indebtedness. The petition stated this fact, as required by the Code, and also stated "that said defendants have disposed of their property, in part, with intent to defraud their

creditors, and also that the said defendants are about disposing of their remaining property, with the intent to defraud their creditors." The only question to be considered is, does this averment in the petition fully embrace the fact or averment required by the Code, § 1852. The fact as stated in the Code is, "that the defendant is about to dispose of his property, with intent to defraud his creditors." Although the averment in the petition is not in the very words of the Code, still it comprehends all, and even more than is required. The exact language of the Code need not be given. It is sufficient if the requisite fact is clearly stated. If parties have disposed of a portion of their property, and "are about disposing of *their remaining property*," it would seem superfluous to say, "without leaving sufficient remaining to pay their debts." We think the court did not err in overruling the motion.

3. The defendant's answer traversed those facts in the petition, upon which the attachment was issued, but admitted the execution of the notes. And thereupon the court rendered judgment upon all the notes, without deciding the issue. The averments in relation to the attachment were material. If those averments were not true, the plaintiff had no right to a continuance of the attachment lien, nor had he a right to his action upon the note that was not due. As those material facts were distinctly traversed by defendant's answer, the issue should have been regularly tried and determined. But as those facts relate only to the attachment, and the note which had not matured, the judgment will be reversed only so far as they are concerned.

4. The only remaining question presented in this case is, can a judgment be properly rendered upon a note or debt before it is due? Where nothing but time is wanted to fix an absolute indebtedness, an attachment may be issued to secure such indebtedness, under the provisions of the Code, § 1852; but it does not follow that a judgment may

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be rendered against the debtor, without his consent, before the liability is matured. Unless expressly required by law, or justified by the consent of the debtor, a court should not feel authorized to render a judgment so prematurely. That section of the Code was enacted as a protection against fraudulent creditors, and not to authorize abortive judgments. The lien might be created before the indebtedness matured, when a party is attempting to defraud his creditors, but a judgment could not legitimately follow until after there is a default in payment.

The attachment is dissolved, and so far as it relates to the note that was not due, the judgment is reversed.

Judgment reversed.

Smith, McKinley and Poor, for appellants.

Cook and Bro., for appellee.

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GILLAM *et al.* v. HUBER.

A note transferred before due, and in good faith, cannot be avoided by a subsequent payment on garnishee process, but such payment would be good against an assignee, who fraudulently obtained the note to defeat the creditors of the payee.

Appeal from Lee District Court.

Opinion by GREENE, J. This action is founded on a promissory note, given by Gillam and Loveland to A. Ritter, due April 1, 1852, for \$275 77. By endorsement on

the back of the note, dated March 3, 1852, it was assigned to the appellee, Martin Huber.

Among other things, the defendants aver in their answer that the administrator of Charles F. Peters, obtained a judgment against A. Ritter, for \$272, and on the 22d of June, 1852, execution issued, and the original indebtedness of the defendants, to A. Ritter, was levied upon, and they paid to the sheriff, on the execution, the sum of \$255 77, without notice of the transfer, and that the transfer took place after said payment, and was made to defeat the garnishee process.

The plaintiff denies these averments, and claims to be an innocent holder of the note for a valuable consideration, obtained before it was due. Under these pleadings, the plaintiff recovered judgment for the amount of the note.

On the trial, the court very correctly charged the jury, that if they found from the evidence that the note was transferred in good faith, before due, to the plaintiff, the subsequent payment by defendants, on a garnishee process, would be a payment in their own wrong, and would not shield them in law from paying it a second time, to an innocent assignee. But the defendants requested the court to instruct the jury: "that if defendants paid the amount of the note to the sheriff, on execution against Ritter, and if plaintiff's title to the note was obtained to defeat the creditors of Ritter, and in fraud, the plaintiff cannot recover, and the payment to the sheriff would be good, against such fraudulent holder." This instruction the court refused to give. This we think is erroneous. The instruction should have been given. If not in the very form, it should at least have been given in substance, with such explanations as the evidence in the case might require. Such instruction was at least applicable to the pleadings in the case, and, so far as we can judge from the bill of exceptions, equally applicable to the evidence. If the plaintiff did not acquire posses-

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sion of the note in good faith, as an innocent assignee, if the transfer was made to defraud Ritter's creditors, there could be no legal propriety in requiring the defendants to pay the note a second time for his benefit.

Judgment reversed.

J. C. Hall, for appellants.

Miller and Beck, for appellee.

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▲ An attachment should not be granted, unless asked for in plaintiff's petition.

▲ A note made payable to bearer, should be transferable by indorsement, or else sued in the name of the payee, or his legal representative.

Appeal from Polk District Court.

Opinion by GREENE, J. This suit was commenced by attachment. The action was founded on two promissory notes, and an item of account. Trial by jury. Verdict and judgment for plaintiff. Defendant appealed and has assigned several errors.

1. It is claimed that the court erred in overruling the motion to dissolve the attachment. There is at least one good cause given for dissolving the attachment. The petition gives no reason, nor does it ask, for an attachment, and therefore it should not have been granted. The relief granted should not exceed that requested by the petition. Code, § 1820. This rule should be especially observed in reference to the extraordinary and stringent proceeding by

attachment. This process should only be granted for good cause, and when especially demanded in the petition. ^(a)

2. The second and third errors assigned, are in reference to the two notes which were permitted to go to the jury. Neither of these notes was made payable to the plaintiff, nor was either of them payable to bearer, or indorsed by the payee. The answer denied plaintiff's right to these notes, and defendant objected to their introduction. Still the court overruled the objection, and admitted the notes in evidence. This was error. As the notes were not payable to bearer, they could not be transferred by mere delivery. They should have been indorsed by the payee, or sued in his name, or in the name of his legal representative.

Besides the answer expressly alledged, by way of avoidance, that plaintiff did not own the notes. This allegation was not denied, and should therefore have been taken as true.

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Judgment reversed.

Madison Young, for appellant.

J. E. Jewett, pro se.

(a) *Ante*, p. 113.

Luman v. Kerr.

LUMAN v. KERR's *Administrator*.

Although an instruction requested by counsel may state the law correctly, it should not be given, if it assumes facts to be proved as true, which are in issue before the jury.

Appeal from Lee District Court.

Opinion by GREENE, J. This was an action of replevin commenced by L. Luman against B. Kerr before a justice of the peace in Henry county, to recover possession of a mare. Verdict for defendant. On appeal to Henry district court, two trials were had, in both of which the jury disagreed. Venue changed to Lee county. Verdict and judgment for defendants.

The bill of exceptions shows the transaction. It appears that the plaintiff traded the horse in question to one Smith for another horse. Smith warranted his horse to be sound and true, and the evidence would indicate that Smith agreed if his horse was not as he recommended him, it was to be no trade. The horse appeared to be both unsound and untrue. The next day plaintiff went to Smith to return the horse, and recover the mare, but Smith was not at home. In about a week he went again to Smith, who then refused to trade back. Some time after Smith sold the mare to Kerr, the defendant, from whom the plaintiff replevied.

The question whether the trade was absolute or conditional, was submitted to the jury, under the instruction that if they believed the trade to be conditional, the plaintiff was not thereby divested of his property, and was entitled to recover, if he had used due diligence in taking back the horse he received from Smith, and in claiming the one sued for.

Several errors are assigned in relation to the instructions which were given at the request of the defendant. The

instructions objected to, relate to fraudulent contracts, and all assume, in substance, that such contracts are not void, and voidable only at the instance of the injured party, and against the perpetrator of the fraud; and that such fraud can in no event be available against an innocent third party, who purchased in good faith and without notice of the fraud.

Assuming the facts in the case to have been fully proved, as claimed by defendant's counsel, these instructions contained no erroneous proposition of law. Abstractly considered, they would be correct, but when considered in connection with the facts in the case, they were calculated to exert too strong an influence against the plaintiff. They assumed facts to have been proved, which were in dispute and to be decided by the jury. They take for granted, or assume to decide, facts which were neither admitted by the pleadings, nor proved by the evidence. They take for granted that the purchase was unconditional, upon adequate consideration, and without notice of fraud. Such instructions are calculated to mislead the jury; and although they state the law correctly, they charge too strongly upon the facts. So far as facts are concerned, the jury should be left free from any influence by the court. These instructions appear to have been worded with a particular reference to the influence they would be likely to have upon the jury in deciding the facts. Nothing would be more likely to exert an undue influence on a jury, than the positive and decisive language contained in the instructions in reference to the facts. Before the instructions were asked, the court had charged the jury fully and correctly upon the law of the case, and left the facts with them, where they legitimately belonged. But defendant's counsel very adroitly managed to decide those facts for the jury, in the instructions, so gilded and embellished with a correct statement of the law, as to obstruct the discrimination of the court, and especially calculated to mislead the jury. Great care

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and discrimination should be exercised by *nisi prius* courts, in submitting such instructions as are requested by counsel, for when approved and repeated by the judge, the jury take it for granted that the facts, as well as the law of the case, are to be decided accordingly. Most jurors are glad to escape the trouble of an investigation, and the perplexity of deciding; and are more than inclined to adopt any judicial decision, or intimation, that may be submitted to them. Hence great caution should be exercised, and jurors should often be admonished by the courts that they alone are to investigate and decide the facts in the case submitted to them.

The impropriety of charging a jury upon the facts, so as to direct their finding, was considered in *Woods v. Mains*, 1 G. Greene, 275; and still more fully in *Fredrick v. Gaston*, ib., 401. True, in those cases, the charge was made directly upon the facts, while in the present case, the facts in issue were assumed to be true and established, under an avowed instruction upon the law. Both are alike objectionable and repugnant to the policy of our law.

Judgment reversed.

J. C. Hall and *Wm. Thompson*, for appellant.

Geo. C. Dixon, for appellees.

O'FERRALL v. SIMPLOT.

In an action at law, by a widow, for dower, a material omission in a certificate of acknowledgement, cannot be supplied by parole proof.

The form of acknowledgement used in 1840, not to be regarded as a construction of the Statute, approved January 4, 1840, under authority of *Jackson v. Granaer*, 2 Cow., 552.

A certificate of acknowledgement, by a *feme covert*, under the Statute of 1840, which does not state that she was made acquainted with the contents of the deed, nor that she relinquished her dower, is fatally defective, and will not pass her estate.

Appeal from Dubuque District Court.

Opinion by GREENE, J. Action for right of dower to a lot in Dubuque, commenced by Jane B. O'Ferrall against John Simplot. It appears that F. K. O'Ferrall, the husband of the plaintiff, entered the lot in question at the United States land office, April 3, 1840, and in October, following, sold the lot to C. E. Harbison, who subsequently conveyed the same to Simplot. Jane joined in the deed with her husband to Harbison, but claims that her rights were not divested by that conveyance, in consequence of the defective character of the certificate of acknowledgement. That is the only question involved under her demurrer to defendant's answer, which demurrer was overruled by the court below, and therefore she appealed. She claims that she never relinquished her dower; that the law in force which authorized dower to be relinquished, and provided the manner in which it should be done, was not complied with. The statute in force at the time was that of 1840, p. 38, § § 20 to 23.

Section twenty merely provides that the wife must join with her husband in the conveyance, acknowledge it, and that the acknowledgement must be certified to, &c.

By section twenty-one she must be personally known to

O'Ferrall v. Simplot.

the certifying officer, or proved by one creditable witness to be the person whose name is subscribed to the conveyance ; she must be made acquainted with the contents of the conveyance, and acknowledge, on an examination apart from her husband, that she executed the same, and relinquished her dower to the real estate therein mentioned, freely and without compulsion or undue influence of her husband.

Section twenty-three provides as follows : " The certificate of relinquishment shall set forth that such married woman was personally known to at least one judge of the court, or to the officer taking the same, to be the person whose name is subscribed to such conveyance, or was proved to be such by at least one witness, whose name shall be inserted in the certificate ; that she was made acquainted with the contents of such conveyance, and acknowledged, on an examination apart from her husband, that she executed the same, and relinquished her dower to the real estate, therein mentioned freely and without compulsion or undue influence of her husband."

The certificate in this case, it will be observed, does not conform to the requirements of this section. It is in these words :

" TERRITORY OF IOWA, }
County of Dubuque. }

" This day, came before me, George L. Nightingale, a justice of the peace in and for said county, Francis Kelly O'Ferrall and Jane B. O'Ferrall, his wife, both of whom are personally known to me to be the identical persons whose names are affixed to the foregoing instrument of writing, and acknowledged having signed the same for the purposes therein mentioned ; and I further certify that, having examined the said Jane B. O'Ferrall separately and apart from her husband, she acknowledged to me that she signed said instrument of writing of her own free will, and without any compulsion from her husband. Given under my hand, this 20th October, A. D., 1840.

GEORGE L. NIGHTINGALE, J. P."

Here are two material omissions. The certificate does not state, in any form, that the wife *was made acquainted with the contents of the conveyance*, nor does it state that she *relinquished her dower to the real estate therein mentioned*. In all other particulars the law is substantially complied with. It is conceded that the certificate is substantially defective, but it is claimed that the omissions may be supplied by parole proof. If they were the result of *accident, mistake or fraud*, and if this proceeding was in equity, there would be some foundation for parole proof. In such cases only will courts of equity admit such evidence to qualify and correct written instruments. Story's Eq. Jr., § 1531.

But a certificate of acknowledgement is something more than a written instrument. It is the evidence required by law, of the execution and acknowledgement of a written instrument of the highest order. Can such evidence, can the requirements of law, be thus qualified and corrected, even in a court of equity?

In support of this certificate, it is urged that the form of certificate used in this case, was that commonly in use, and was supposed to be sufficient in the territory of Iowa. There was then a design in this form of acknowledgement. It was adopted because it was thought to be commonly in use. How then can it be pretended that there was accident or mistake in preparing the certificate, when the form "commonly in use" was observed, without deviation or omission? The argument tells us that the mistake consists in the justice, and in his not understanding the law of January, 1840, in relation to such certificates. Ignorance of the law will hardly be recognized as one of those mistakes which a court of equity will correct. *Ignorantia juris non excusat*.

The statute in force at the time of this acknowledgement, —like the statutes of other states upon the same subject,—not only requires certain facts to be acknowledged, but it requires those facts to appear in the certificate. The latter is as imperative, and would seem to be as essential as the

former, to the validity of the wife's relinquishment of dower. Not only the *facts* that the contents of the deed were made known to the wife, and that she thereupon relinquished her dower to the real estate described, are essential; but it is equally important that those facts be recorded in the certificate, in order to make the deed effectual to pass the estate of a *feme covert*. This estate is vested in her at common law, in part remuneration for the disabilities growing out of coverture. As a *feme covert*, her legal identity is merged into that of her husband, and in general she can do no act that is binding. Her contracts are not only voidable, but generally absolutely void. Being, by the law, so completely divested of power, and almost of individuality, the wife's contingent rights should not be cut off without, at least, a substantial compliance with the formalities which the law has provided to protect her against imposition and fraud. We would not go so far as some courts have done, and say that these requirements should be strictly and literally complied with, but we cannot under the law and the entire current of authorities, avoid the conclusion, that they should be substantially observed, in order to divest the wife's dower, and that a material defect or omission in the certificate cannot be supplied by parole testimony.

The authorities upon this point appear to be in a uniform current, and without deviation. In *Elliott v. Piersel*, 1 Peters, 338, it is expressly decided that the privy examination and acknowledgement of a deed by a *feme covert*, cannot be legally proved by parole testimony, so as to pass or convey her estate. In *Jourdan v. Jourdan*, 9 Serg. & Rawl., 268, it is decided: That when a deed executed by a married woman is void, parole evidence is inadmissible, to show that after her husband's death she delivered and ratified it. See also *Barnet v. Barnet*, 15 Serg. & R., 78; *Watson's Lessee v. Bailey*, 1 Binny, 470; *Elliott v. Piersel*, 1 McLean, 11; *Jamison v. Jamison*, 3 Wharton, 457; *McFarland v. Febiger*, 6 Ohio, 337; *ib.*, 136; *Carr v.*

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Williams, 10 ib., 305 ; *Silliman v. Cummins*, 13 ib., 116 ; *Hayden v. Westcott*, 11 Conn., 129 ; *Martin v. Dwelly*, 6 Wend., 1.

But it is contended that the form adopted in this case was in very common use, and therefore it should be regarded as a construction of the statute. This argument has no foundation, either in fact or in reason. As the act had not been in force a year prior to the date of the acknowledgement, a general use or custom could not have existed under the act. Besides, there is no question of construction involved in the case. The requirements of the law are explicit, and free from ambiguity. And the certificate in this case entirely omits two of the most important requirements. Hence this case has no analogy to that of *Jackson v. Gumaer*, 2 Cowen, 552. The New York statute required the certificate to show that the officer taking the acknowledgement, either knew personally, or had satisfactory proof that the person making the acknowledgement, "is the person described in, and who has executed the conveyance." The certificate in *Jackson v. Gumaer*, described the person as being "*to me known*." Thus, in substance, complying with the statute, under the aid of long established usage, which the court say, "may perhaps amount to a construction of the act ;" and the certificate was held to be sufficient. But if the words "*to me known*," or words of like import, had not been in the certificate, it is obvious that the court would have pronounced it insufficient to pass the wife's estate.

In the certificate under consideration, the two most important facts and requirements, for the protection of the wife, are entirely omitted. It does not in any way intimate that the wife was made acquainted with the contents of the deed, nor that she relinquished her dower. We are not furnished, by the certificate, with the slightest foundation, even for an inference, that either was done. Believing, as we do, that the purchaser acted in good faith ; that he paid in full for the lot, and was justly entitled to a perfect title,

we would gladly decide the case in his favor, if the deed, in connection with the law and authorities, would justify such a decision.

The case in 2 Cowen, upon which so much reliance is placed by counsel for appellee, cannot, as we have already shown, justify the certificate. And the cases of *Chestnut v. Shane's Lessee*, 16 Ohio, 599; and *Ruffner v. McLenan*, ib., 639, were under a different statute from ours. In those cases, it was held that the laws of Ohio did not require the officer to state, in his certificate, that the contents were made known; and that the court would presume that the officer did his duty. But the statute of Iowa imperatively required that the certificate should show that fact.

It has been repeatedly decided in Pennsylvania, that an omission to state that the contents were made known, is fatal. *Fowler v. McClure*, 6 Serg. & R. 143; *Steels v. Thompson*, 14 ib., 84; *Watson's Lessee v. Bailey*, 1 Binny, 470.

In *Garnett v. Stockton*, 7 Humphrey, 84, it was held that an omission to state in the certificate of acknowledgement, that the party acknowledging, was personally known to the officer, is fatal to the transfer of dower. See also *Stevens v. Owen*, 12 Shep., 94; *McFarland v. Febiger*, 6 Ohio, 337; *O'Connell v. O'Connel*, ib., 142; *Catlin v. Ware*, 9 Mass., 218 and note a; *Lufkin v. Curtis*, 13 Mass., 223; *Shepard v. Wardell*, Coxe, N. J., 452; *Raverty v. Fudge*, 3 McLean, 230, 245; *Percy v. Calhoun*, 8 Humph., 551; *Clark v. Redman*, 1 Blackf., 379; *Corporation v. Hammond*, 1 Har. & J., 921; *Heath v. Guardian* ib., 751; *Green v. Muse*, 2 Har. & J., 62; *Mariner v. Saunders*, 5 Gillman, 113; *Hughes v. Lane*, 11 Ill., 128; *Mason v. Brock*, 12 ib. 271. It would seem useless to multiply authorities upon a doctrine so uniformly conceded by the books. They all justify the conclusion that a deed so defectively acknowledged, by a *feme covert*, as is the deed under consideration, carries its own condemnation upon its face, and cannot operate as a bar to the wife's dower. Hence it follows that the court below erred

Davis v. O'Ferrall.

in overruling the demurrer to defendant's answer, not only in this case, but in the cases against B. J. O'Halloran, T. and C. O'Donnell and S. C. Tirrnan.

Judgment reversed.

Smith and McKinlay, for appellant.

Clark, Bissell and D. S. Wilson for appellee.

DAVIS v. O'FERRALL.

Under the statute of 1839, as at common law, the widow is entitled, during her natural life, to one third part of all the lands and tenements in which her husband was seized, at any time during coverture.

The Code provides that the widow's dower shall be one third of her husband's real estate, in fee simple.

Courts favor dower, but this rule should not be carried so far as to impair vested rights, by giving a statute a retrospective operation.

Every statute which takes away, or impairs vested rights, acquired under previous laws, must be considered retrospective, and opposed to sound principles of jurisprudence.

The Code does not operate retrospectively in reference to dower, consequently when the husband conveyed his title to land, without the wife's relinquishment, before the Code took effect, and died subsequently, the widow is entitled to dower, for life only, according to the law in force at the time of sale.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This suit was commenced in the county court of Dubuque, by Jane B. O'Ferrall against Timothy Davis, for dower in lot 477, A, in the city of Dubuque, which was deeded by F. K. O'Ferrall to E. M. Bissell, in 1840.

The plaintiff recovered, and one third of the lot in ques-

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tion, was set apart to her in fee simple. On appeal to the district court, this judgment was affirmed.

The only question involved in this case is, whether the demandant is entitled to dower in fee simple, or only to a life estate.

The statute in force at the time O'Ferrall conveyed the lot to Bissell, was that of 1839, p. 485, which authorized dower in the wife, according to the course of the common law. Under this law the widow is entitled, during her natural life, to one third part of all the lands and tenements in which her husband was seized, at any time during coverture.

But as O'Ferrall died after the Code took effect, and as the Code provides that a widow's third of the real estate shall be in fee simple, it is claimed that Mrs. O'Ferrall shall have absolute title to the dower estate set apart to her. In support of this position, it is argued that the dower estate, during the husband's life, is inchoate and contingent, and is subject to legislation. So far as such legislation affects merely the dower, as between the husband and the wife, or widow and the heirs, or so far as it relates to the property, at the time of his death, the doctrine assumed for the dowress, would be appropriate, and without serious objection; but not so when such legislation would affect the rights of innocent purchasers. Vested rights and the obligations of contracts should not be impaired.

Although the doctrine seems to be universally recognized that courts favor dower, this favor should not be carried so far as to do violence to fundamental principles, and to the rights of *bona fide* purchasers. As the law under which a contract is made, enters into and becomes a part of it, surely the law in force at the time the sale and conveyance were made, should govern in preference to a subsequent law, which did violence to the intentions of the parties, and impaired their contract.

At the time of the sale, O'Ferrall's interest in the land

was subject only to the contingent dower estate, for life. The purchaser bought subject to that contingency, knowing that if it ever became an incumbrance upon his land, it could be but temporary, and then the entire estate would revert to him and his legal representatives. As Bissell bought O'Ferrall's entire interest in the lot, subject only to dower for life, upon the contingency of survivorship, it follows that his title to the property was fully vested, and could not be impaired by subsequent legislation. Every statute which takes away or impairs a vested right, acquired under previous laws, must be considered retrospective, and opposed to those principles of jurisprudence which have received universal commendation. But there is nothing in the Code in reference to the rights of wives and widows, that contemplates a retrospective operation, and therefore no such construction can be justified. *Whitman v. Hopegood*, 10 Mass., 437; *Somerset v. Dighton*, 12 ib., 383, 385; *Madford v. Learned*, 16, ib., 215.

The Code completely abrogates the general doctrine of dower. It substitutes a new system, and makes the wife, in effect, a joint owner of one third of all real estate in which the husband, at any time during the marriage, had a legal or equitable interest. In like manner, the husband is entitled to the same interest in the lands acquired by the wife, and so far as the conveyance is concerned, a wife may convey as a *feme sole*, having a joint interest in the land, or "in the same manner as other persons." A change so complete can have no connecting link with, or retroactive effect upon, prior statutes, regulating a wife's dower. And as the husband was not at any time seized of the land in question, under the Code, it can impart no validity to the claim that the widow's life estate was thereby converted into an absolute title in fee. If one third of an estate for life can thus be converted by retrospective construction into an absolute fee, upon the same principle, one-half or three-fourths of the real estate, sold for a full consideration by the husband, may be legislated and construed from the

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defenseless purchaser, to the cravings of the insatiable widow.

We greatly admire and would proudly support the liberality of our laws, in making bountiful endowment for widows, but we cannot carry that liberality so far as to make laws operate retrospectively, and thus impair the obligation of contracts. We would give them their full share of the husband's estate; we would incline strongly towards them in doubtful or evenly balanced cases, and enforce every legal safeguard for the wife's benefit, but we cannot, with all our predilection for them, trample vested rights under our feet, and deprive purchasers of their long established rights, by giving to prospective laws a retrospective power. The case of *Reynolds v. Reynolds*, 24 Wend., 193, and other cases cited in support of the decision below, fall far short of the facts and principles involved in this case.

If O'Ferrall had at any time been seized of the lot in question, after the Code took effect, it would then follow that the widow should have her joint interest in the property, agreeable to that law. But as he had transferred his title to the lot long before, and as that part of the Code does not claim to divest antecedent rights, we can find nothing in principle or authority to justify the demandant's claim.

We conclude, then, that the appellee can only claim dower for life, under the statute in force at the time her husband aliened the property; and that the rights of the purchaser could not be impaired by subsequent legislation.

Judgment reversed.

T. Davis, Clark and Bissell, for appellant.

Smith & McKinlay, for appellee.

OUR HOUSE, NO. 2 v. THE STATE.

An indictment against a house, as a dram shop and nuisance, when a lien is not sought upon the property, need not state the owner's name, nor aver his knowledge of the unlawful traffic.

Where an offense, charged is continuous, as a prohibited traffic, carried on from day to day, it may be laid with a *continuando*.

An indictment is good which charges the facts constituting the offense substantially in the language of the Code.

Those provisions of the Code which prohibit the sale of intoxicating liquors by the glass, and which authorize proceedings *in rem*, against "dram shops," are not unconstitutional, and should be enforced.

Appeal from Des Moines District Court.

Opinion by GREENE, J. Indictment against "*Our House, No. 2,*" in the city of Burlington, as a dram shop and public nuisance under the Code. Demurrer to the indictment overruled. Plea not guilty. Verdict and judgment against the house as a nuisance.

The objections to the proceedings may be considered under two heads. 1. The sufficiency of the indictment. 2. The constitutionality of the statute.

The indictment charged in substance that "Our House, No. 2," which is particularly located and described, is kept as a dram shop and public nuisance by Harrison Shaw; that intoxicating liquors have been sold therein by the glass, with a view to their being drank on the premises, in said county, on divers days, between the first day of December, A. D. 1852, and the twenty-fifth day of April, A. D. 1853, to divers persons to the grand jurors unknown, contrary, &c.

It is objected that the indictment is defective, in not alleging the particular days on which sales were made; in not averring the owner's name and knowledge of the unlaw-

ful traffic, and in averring the charge in the form of a *continundo*.

The indictment is framed under §§ 926 and 932 of the Code, and does not contemplate holding a lien on the building and lot as provided in § 933, consequently the averments proposed in reference to the owners of the property were not necessary.

Nor is it necessary to state any particular day upon which the statute was violated. The offense charged, is continuous, a prohibited traffic, carried on from day to day, and may, with propriety, be laid with a *continundo*. It is objected that unless the time is designated, this trial could not be pleaded in bar to a subsequent prosecution for the same offense. But clearly a subsequent prosecution could not be sustained for the *same offence*, within the time mentioned in the indictment. Still another indictment might be found and successfully prosecuted, for another offense growing out of the same transaction. This proceeding is merely to abate the nuisance; another prosecution might be sustained against the keeper of the nuisance, for retailing intoxicating liquors by the glass. In a proceeding like the present, it would seem necessary to charge the nuisance as having continued from a given time, to the time suit was commenced. If the dram shop had only been in operation on one or two given days, and not continued, where the necessity for abating the nuisance?

In all particulars, then, we consider the indictment sufficient in form. The offense, and the facts which constitute it, are charged with clearness, and substantially in the language of the statute. This is all that can be required. *State v. Seamons*, 1 G. Greene, 418; *Buckley v. State*, 2 ib., 162; *Nash v. State*, ib., 286; *State v. Chambers*, ib., 302; *Romp v. State*, 3 ib., 276; *Winfield v. State*, ib., 339.

2. We are next to consider whether the statute which authorized an indictment against a dram shop, is constitutional. The Code prohibits places commonly known as

"dram shops," declares them public nuisances, and a violation of the law prohibiting the sale of intoxicating liquors by the glass. To abate such nuisance, under an indictment like the present, not seeking to hold the building and lot liable, the proper officer may take possession of the establishment, and sell the furniture, vessels and other goods found therewith, for the payment of the fine and costs. Code, § 935. In this we see no conflict with the rights of persons and property, as sanctioned by the constitution. The statute is intended as a great public benefit. It seeks to abolish a general and growing evil, which is having a most degrading effect upon the moral and physical condition of our race. It seeks to keep men from the common use of those intoxicating and poisonous beverages which so frequently lead to the ruin of property, character and health, and are proved to be the leading incentives to crime. It seeks to promote the general welfare, by prohibiting an excessive vice which is doing more to disqualify men for self-government, than all other influences combined. It seeks to keep men in a better condition to enjoy and protect their natural and legal rights, by drying up those corrupt sources of violence and wrong, from which can be traced most of the outrages upon those unalienable rights of life, liberty, property, safety and happiness, which our constitution claims to protect. A law having such objects in view, striking as it does at the fountain head of the evil, and still doing no violence to the political rights of the offender, cannot be regarded as unconstitutional. †

Under our federal, as well as under state constitutions, it is not uncommon to pass laws declaring articles to be forfeited, when they are used for illegal or criminal purposes. This is the case under the laws prohibiting counterfeiting, smuggling and piracy. So also, with obscene books and pictures.

The act of Congress of 1790 in relation to the collection of revenue, authorizes proceedings, *in rem*, against the goods, wares and merchandise, for a breach of that act; simi-

lar to those authorized *in rem*, in the chapter of the Code under which this indictment is framed. So with the act of Congress of 1819, in reference to vessels in which piratical aggressions have been attempted. Still the constitutionality of those acts have never been questioned.

That proceedings *in rem*, against property used for unlawful purposes, may be sanctioned by laws, without doing violence to the constitution, is conclusively settled by the highest judicial tribunal in our country. *Cargo of Paulina v. United States*, 2 Cond., 411; *Cargo of Aurora v. United States*, ib., 541; *United States v. 1900 bags of Coffee*, 3 ib., 187; *United States v. 80 Hhds. Sugar*, ib., 853; *United States v. 150 crates Earthen Ware*, 4 Cond. 242; *United States v. 6 Packages Goods*, 5 ib., 161; *United States v. 350 Chests Tea*, 6 ib., 593; *United States v. 422 Casks Wine*, 1 Pet. 547; *United States v. 84 Boxes Sugar*, 7 ib., 453.

Again, the revenue laws of every state in the union authorize proceedings *in rem*, against the property alone, in the event of failure to pay taxes, and such laws are not considered unconstitutional.

This proceeding under the Code does not deprive a person of his property without due process of law. The keeper of a dram shop is notified and has his day in court, with opportunities to defend. If the keeper is only a tenant, the landlord has an opportunity to see that the requirements of the law are observed in reference to his property, which he has permitted to be used for unlawful purposes. It is not necessary to make the owner of the property a party to the indictment. The Code distinctly authorizes the proceeding against the property itself, and the party in possession, or against either. Nor is it necessary that the person should be convicted before the property can be reached. The property is made an offender as well as the person who deals in the prohibited article; and the state may elect which to proceed against, or proceed against them jointly.

The principles objected to, as unconstitutional, in this chapter of the Code, are fully recognized in "*The Palmyra*," 12 Whet., 13. In the opinion by Judge Story, it is said: "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing, and this whether the offense be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the admiralty. Many cases exist where the forfeiture for acts done, attach solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecutions were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem*, stands independent of, and wholly unaffected by, any criminal proceeding *in personam*." In this same case, the doctrine is held that no personal conviction of the offender is necessary to enforce a forfeiture *in rem*. The principles of law endorsed in "*The Palmyra*" are especially appropriate to the case at bar. True, in this case, the offense is *malum prohibitum*, but Judge Story declares the doctrine to be the same, as when the act is in itself criminal. In either case the legislature has the power to direct proceedings *in rem*, independently of proceedings *in personam*.

The legislative right to pass laws to protect the health, the morals, the property and the lives of the people, is not only the prevailing object of all civilized constitutions, but it is also the very foundation upon which our social system rests, and he who violates those laws may not only forfeit property and personal liberty, but also life itself. It is a fundamental principle of protection to society, that the majesty of the law must be enforced against offending members; and against offending property. If property becomes a nuisance, if prejudicial to the health or morals of the public, it may be abated or destroyed by legal sanc-

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tion. This power is in harmony with self preservation, and is essential to every organized community.

We conclude, then, that those provisions of the Code which prohibit the sale of intoxicating liquors by the glass, and authorize proceedings *in rem*, against "dram shops," are not unconstitutional.

Judgment affirmed.

Hill and Thompson, for appellant.

Chas. H. Phelps, for the state.

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MORRISON v. LANGWORTHY.

In the act of 1847, the northern boundary line of Dubuque is designated as starting from a given "stake and stone," "thence on the north boundary north sixty-seven degrees thirty minutes, east to the middle of the main channel of the Mississippi river;" held that the general and unidentified words "on the north boundary," would not justify a deflection from the given course, and that the locative termini of the line, and the given course, must govern.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This proceeding was commenced by J. L. and E. Langworthy, by a petition to the county judge for an injunction against D. M. Morrison, as collector of taxes for the city of Dubuque, to restrain him from selling certain lands for city taxes. The injunction was granted, on the ground that the lands referred to, were not within the city limits, and therefore not subject to city tax. The case was submitted to the dis-

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trict court, by agreement of counsel, on the single question, whether the Dubuque city charter of 1847 included land outside of the original survey. The court decided that the land in question is not subject to city tax, because not within the city limits.

It is now claimed that the district court erred in this decision. This involves a simple question of construction. By the act of 1847, amending the charter of 1840, the territorial limits of the city are materially changed. The act of 1840 recognizes the original bounds of the town of Dubuque, as laid out by commissioners, appointed pursuant to an act of Congress, to lay off the town of Dubuque, while the act of 1847 adopts new lines, and more extended boundaries, referring in part, only, to the original lines of the town. The old boundary extended merely to the slough, situated between the town and the Mississippi river, while the new boundary embraces the slough, by extending the city limits to the middle of the main channel of the river. The act of 1847 defines the boundaries as follows: Beginning at a point in the middle of the main channel of the Mississippi river eastwardly, and in a line with the south boundary of the town of Dubuque, as surveyed and laid out by the commissioners, appointed in pursuance of an act of Congress, to lay off the towns of Fort Madison, Burlington, Dubuque, &c., thence south sixty-seven degrees, thirty-nine minutes west, to a stone planted in the ground, thence on the westerly boundary north twenty-two degrees, thirty minutes west, to a stake and stone; *"thence on the north boundary north sixty-seven degrees thirty minutes east, to the middle of the main channel of the Mississippi river; thence down said river, with the said channel, to the place of beginning."*

A large portion of the southern, all of the western and a small portion of the northern boundary, appear to be agreeable to the original survey of the town. But according to that original survey, in starting from the north-west corner, and running thence north sixty-seven degrees

thirty minutes east, it is only fifty-four chains and fifty-five links in that direction, but runs thence south twenty-two and a half degrees east, thirty-eight chains and seventy links, and thence runs north sixty-seven and a half degrees east about thirty-two chains to the slough. Thus leaving the land in question, and a large amount of other lands, lake and slough outside of the city, according to the original survey, and the boundaries established by the act of 1840. But we think this territory is within the city limits, and south of the line designated by the act of 1847, as starting from the north-west corner, "*thence on the north boundary north sixty-seven degrees thirty-minutes east, to the middle of the main channel of the Mississippi river.*" There is no ambiguity in this language, and clearly no off-set or diverging line is contemplated from the course designated. The line starts on the north boundary, and continues on the direct course designated, to the Mississippi river. But according to the construction given below, this line is not permitted to run more than one-third of its prescribed course, before it is required to take a right angle to the south, and run *on an east boundary line* over thirty-seven chains, before performing its journey to the river, thus excluding from the city about one-third of its rightful territory.

Great importance is attached to the words "north boundary," but we can see nothing in them to justify so material a deviation from the course so clearly called for and designated. What is there in these words to show that they refer to the "north boundary," as established by the commissioners, under the original survey? So undefined and disconnected are these words, that they may, with at least equal, if not greater propriety, refer to the new north boundary, as established by the act of 1847, as to the old boundary, established by the act of 1840. If they relate to the old north boundary, they are not consistent with the course designated; but if to the new, they are consistent. That construction which will secure har-

mony, and the least conflict of meaning, should be favored. If the legislature intended to adopt the line of the original survey, at the north end of the city, that intention would have been expressed in the description. The original course from the north-west corner, was partly north boundary, and partly east boundary, and extend only to the slough, scarce half way to the Mississippi river, while the new description took a direct, undeviating line, forming a north boundary all the way, and extending to the middle of the river.

But it is claimed that course and distance must yield to ascertained, fixed and certain objects, as decided in *Gavney v. Hinton*, 2 G. Greene, 344. True, but where are those ascertained and fixed objects, to which the specified course should yield? Surely, not in the vague and undefined term of "*north boundary*." What north boundary? When and by what objects established?

At most, the term "*north boundary*," is general, directory and uncertain, and should yield to the special or locative call, as designated by the needle. *Wright v. Mabry*, 9 Yerg., 55. In *Bell v. Hickman*, 6 Humphrey, 398, it was held that special or locative calls must control those which are merely directory and general. The line in question, in starting from the north-west corner of the incorporated district, had distinct and special objects, a "stake and stone," and thence on the north boundary, and on a given specified course to the middle of the river. Here the termini are locative and visible objects; the course is also specially and clearly given, hence the term "*north boundary*," without being identified, is too vague and equivocal to justify any deflection from the given course.

Judgment reversed.

Hempstead and Burt, for appellant.

Smith and McKinlay, for appellee.

Jones v. Alley.

JONES v. ALLEY.

A written contract cannot be materially changed by parole agreement. The time stipulated for payment in a written contract may be extended by parole agreement, but it cannot by parole be made essential, when it is not so stipulated in writing.

Under a contract for land, the entire consideration money should be paid before an unconditional decree for specific performance is rendered.

Appeal from Marion District Court.

Opinion by GREENE, J. Petition filed by Jonathan Alley against Thomas Jones, for specific performance of a contract to convey land. The answer acknowledges the contract, but claims that it was forfeited because payment was not made within the time stipulated. Decree for plaintiff. To this decree it is now objected that as payment was not made or tendered within the time stipulated by the bond, that the obligor could not subsequently be required to recover the stipulated payment and make the deed. This proposition would be true, if *time* had been expressly made of the essence of the agreement. But when *time* is not by express agreement made essential, the validity of a bond is not forfeited by a failure to pay within the time stipulated. But it is contended, in this case, that time was made essential, by parole agreement, subsequent to the delivery of the bond. If this fact was established by proof, it would not help the appellee. A written contract cannot be thus materially varied by parole agreement, without consideration. *Bond v. Jackson*, Cooke, 500; *Seward v. Patterson*, 3 Blackf., 353; *Adams v. Nichols*, 19 Pick., 275. A subsequent parole agreement to extend the time of payment or performance has been considered good, because such agreement does not vary or change the stipulations; it merely extends the time of performance. *Keating v.*

Price, 1 John's Cas., 22; *Fleming v. Gilbert*, 3 John. 520; *Hasbrouck v. Tappan*, 15 ib., 200.

But in this case the modification claimed under the parole agreement is material. It does more than extend the time of payment. It makes time essential. It entirely changes the effect of a failure to pay within the stipulated time. Under the written agreement, time is not essential, but under the parole agreement, it becomes a vital condition to the validity of the bond. The bond *per se* may be enforced, but the bond varied by the parole agreement, would be null and void. So material a change in a written contract cannot be recognized under a parole agreement.

The court below erred in this case by decreeing a specific performance without first requiring full payment of the consideration money. For this reason, the decree must be reversed at the cost of appellee. By making payment, appellee may have a decree for the land in this court.

Decree reversed.

William Longhridge, for appellant.

Black and Neal, for appellee.

ROWLAND v. ROWLAND, *et al.*

Where the husband died under the Rev. Stat., and the widow gave birth to a posthumous son after the Code took effect; held that the widow is entitled to dower under the Rev. Stat., and also on the death of the son, may inherit one-third of his estate in fee.

Appeal from Van Buren District Court.

Opinion by GREENE, J. This was an agreed case submitted to the district court. We learn from the agreement these facts. In September, 1850, James B. Rowland was married to Jane McMannus. In February following, the husband died, and in July, 1851, Jane had a child.—When four or five months old the child died. The deceased, James B. Rowland, left some real estate in fee, to be divided among his surviving heirs, consisting of his widow, his brother Samuel P. Rowland and his sister Mrs. Jonathan Downs. The only question is, what portion of this estate should be set apart to the widow. The court below directed that the widow was only entitled to her dower in the land for life, and that the entire remaining interest in the land should be inherited by S. P. Rowland and Jonathan Downs and wife.

Jane Rowland appeals and claims that she is entitled to more than her dower in the land. At the time of her husband's death the Rev. Stat. was in force, and thereby she acquired a dower estate for life. When the posthumous son was born, he inherited the entire estate in fee, subject only to his mother's dower.

The son died after the Code took effect, and his estate must be disposed of accordingly. The Code provides § 1410. "If the intestate leave no wife, nor issue, the whole estate shall go to his father." § 1411; "If his father be previously dead, the portion which would have fallen to his share by the above rule, shall be disposed of in the

same manner as though he had outlived the intestate, and died in the possession and ownership of the portion thus falling to his share."

According to this rule, if the father had been living, the entire estate of this intestate son, would have gone to him, but as the father had previously died, the son's estate is to be disposed of the same way as though the father had acquired the property and died, seized of it after the Code took effect. The mother then was entitled to one-third of the son's estate in fee, upon the principle that she would have been entitled to that interest from her husband if he had inherited the son's estate and died under the Code.— Under the circumstances and law of this case, the widow must inherit one-third of the son's estate. We conclude, therefore, that the appellant, is not only entitled to her dower estate under the Rev. Stat. but that she is also entitled to one-third of the remaining estate in fee. The balance will be inherited by the appellees and be apportioned by the commissioners.

Judgment reversed.

A. Hall, for appellant.

Wright and Calhoun, for appellees.

Reunecker v. Scott.

REUNECKER v. SCOTT.

At common law, the husband is liable for the debts of the wife contracted *dam solo*, but in order to recover against him, she should be joined in the action and judgment.

Under the Code, the husband is not liable for debts made by his wife while single under a contract, "purporting to bind herself only."

Appeal from Dubuque District Court.

Opinion by GARNER, J. This suit was commenced before a justice of the peace, by Geo. W. Scott against F. Reunecker, for medical services, rendered to defendant's wife previous to their marriage. Plaintiff recovered judgment. Defendant had the case taken to the district court on writ of error, where the judgment was affirmed. To the judgment and pleadings below, two errors are assigned.

1. It is claimed that if the husband is liable for debts contracted by his wife before marriage, she should be made a party to the action. In *Gage v. Reid*, 15 John., 408, it was held that if the husband is sued for a debt contracted by the wife, *dam solo*, without her being joined, it is an error, for which judgment will be reversed. *Angel v. Felton*, 6 John., 149; *The People v. Onoida C. P.*, 21 Wend., 20.

In *Gray v. Thacker*, 4 Ala., 136, the action was commenced against the husband and wife, but the judgment was rendered against the husband alone. It was held that the judgment should have been against both, and if against the husband alone, should be reversed.

Although the husband is liable, at common law, for debts contracted by his wife before marriage, still, in order

to enforce that liability, the wife should be joined, not only in the action, but also in the judgment.

2. It is claimed, that under the Code, the husband is not in any way liable for the debt in this case. The Code provides, § 1453: "Except as herein otherwise declared, the husband is not liable for the separate debts of the wife, nor is the property of the wife, nor the rent, nor the income thereof, liable for the debts of the husband. But the separate debts of the wife, as herein contemplated, are only those growing out of the contracts mentioned in the next section." The next section declares: "Contracts made by the wife, in relation to her separate property, or those purporting to bind herself only, do not bind the husband."

In these sections, there is no express reference made to the debts of the wife, contracted while *sole*, but a complete change is made in marital rights and obligations, and this change should be made to harmonize as nearly as possible with justice and propriety. If certain contracts, made by the wife after marriage, do not bind the husband a *fortiori*, the same kind of contract, made by her while single, should not bind her future husband. The contract in this case was made with Miss Paine alone. The record in the case shows that the defendant called upon Dr. Scott, the plaintiff, to testify as a witness, and he swore, in substance, that he rendered the services, and that the charges were made against Miss Paine herself, and not against Mrs. Hanley, with whom she was living as a servant; that he looked to Miss Paine alone for payment; that he knew she worked for a living; that she came to his house several times to work, but complained of being unwell, and did not stay.

There was nothing in this contract purporting to bind any one but herself. It is not pretended, even, that the services were rendered upon any contingent possibility of her future marriage, or the expectation of ultimate collection from an unknown future husband. The services having been rendered exclusively for herself, and upon her own

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credit, "*purporting to bind herself only*," we conclude that under the Code, the appellant is not liable.

Judgment reversed.

Hempstead and Burt, for appellant.

B. M. Samuels, for appellee.

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MAINER v. REYNOLDS.

A note is not negotiable by delivery only, unless made payable to bearer. Where a note, not negotiable by delivery, is issued in the name of the indorser, a copy of the indorsement should be annexed to the petition.

In an action by the indorser of a note where the defendant pleads failure of consideration, and the court instructs the jury that they must be satisfied that the plaintiff had notice of the failure before the note was assigned, it will be presumed that the note was indorsed before due, unless the record shows to the contrary.

Appeal from Polk District Court.

Opinion by GREENE, J. Action commenced by Charles Reynolds against Nathan Mainer, on a note made payable to N. Grant, and assigned by him to plaintiff. Defendant demurred, because there was no copy of the assignment annexed to the petition. Demurrer overruled. Verdict and judgment for plaintiff.

1. It is claimed that the court erred in overruling the demurrer. The Code requires that a copy of the instrument on which suit is founded, should be annexed to the pleadings. § 1750. But when such instrument is issued on in the name of the indorser, is it necessary to annex a copy of the indorsement? If the indorsement became material to the transfer of the note, or where the note

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could not be transferred by mere delivery, we think that a copy of the indorsement should be regarded as a part of the note, and be annexed to the petition. In this case, the note was made to "Noah Grant" alone, and not to him or bearer. A note is not negotiable by delivery, unless made payable to "bearer." It follows, then, that the indorser's right to sue in his own name, depends upon the indorsement, and unless a copy of such indorsement is annexed to the petition, his right of action is not shown *prima facie* by the petition.

2. Appellant contends that the court erred in giving the following instruction, requested by the plaintiff below: "That if, from the evidence, they are satisfied there was a failure in any part of the consideration of the note, in controversy, before they can regard such failure, they must be satisfied that the plaintiff had notice of the failure, before the note was assigned to him by Grant." If the note was assigned before due, this instruction was appropriate, but if assigned after due it was erroneous. The record does not show the date of the indorsement, and therefore it must be presumed in favor of the instruction.

But as the court erred in overruling the demurrer, a trial *de novo* must be awarded.

Judgment reversed.

Curtis Bates, for appellant.

Granger and Williamson, for appellee.

Smith v. The State.

SMITH V. THE STATE.

The mere fact that the indictment was mislaid or stolen after the trial, and could not be sent up with the writ of error, is not sufficient ground for reversing the judgment.

The right to challenge jurors under the Code is unconditional, and any ruling of the court calculated to restrict that right; or to make the defendants right dependent upon the exercise of the same right by the State is erroneous.

A witness whose name is not indorsed on the indictment, if objected to, should not be permitted to testify in behalf of the State.

Error to Appanoose District Court.

Opinion by GREENE, J. Indictment for disturbing a worshiping congregation. Plea not guilty. Verdict guilty.

The record before us is very imperfect. But we will briefly consider the leading errors assigned:

1. "No indictment was ever found against the appellant." The clerk's certificate, states that the indictment was mislaid, or carried away after the trial below. The record conclusively shows, that there was an indictment, upon which the proceedings below were had. The mere fact that the indictment was stolen, or missing, after the trial, and could not be sent up with the writ of error, will not justify this court in reversing the judgment. If a missing indictment, should be deemed sufficient ground to arrest or reverse a judgment, it might often prove very inconvenient to find such presentments.

2. The court erred in ruling, that in challenging the jury, the state must first challenge one juror, and then the defendant two, and so on alternately. Under the wording of the bill of exceptions, it seems that the defendant could not be permitted to challenge even two jurors, until the state had challenged one, and consequently if the state should elect to make no challenge, the defendant would have no right to a challenge. For an offense, less than felony, the

Smith v. The State.

defendant has a right to challenge four jurors, and the state two. This right with both parties, is unconditional. It may be exercised by defendant, to the full extent, whether the state exercises the right or not, and *vice versa*.

The rights of challenging jurors, to the extent provided by the Code, is absolute, and without qualification. The court below, therefore, erred in ruling to the effect that defendant's right, was dependent upon the right being first exercised by the state.

3. The court erred in permitting a witness to testify. 1. Because his name was not upon the back of the indictment. 2. Because the testimony was cumulative.

It appears by the bill of exceptions that the defendant objected to this witness, for the reasons assigned. The Code, requires the names of material witnesses, for the state to be indorsed, on the indictment. Hence according to *Ray v. The State*, 1. G. Greene, 316; and *Harriman v. The State*, 2. ib., 284, when the defendant objects to a witness, whose name is not indorsed on the indictment, he should not be permitted to testify. Inconvenient as this rule may at times appear, still in justice to the accused, it should perhaps be maintained. There is certainly great fairness in advising a prisoner of those witnesses, who may appear against him, in time to guard against false or tainted accusation.

The objection in relation to the cumulative character of the testimony, does not appear to be well founded. In that particular, it does not seem that the court exceeded a sound discretion.

Judgment reversed.

Wm. Penn Clarke, for plaintiff in error.

D. C. Cloud, for the state.

CASES
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF IOWA,

IOWA CITY, JUNE AND DECEMBER TERMS, A. D., 1854.

In the eighth year of the State.

PRESENT :
HON. JOSEPH WILLIAMS, *Chief Justice*.
" GEO. GREENE, } *Judges*.
" J. O. HALL, }

MILLER et al. v. GALLAND.

The date of a note given for services on a steamboat, is not conclusive that the services were rendered at or before such date, so as to give priority of lien for such services, over a seizure and levy made at the same date of the note.

A general judgment on a note for services rendered to a steamboat, cannot have the effect of a preferred claim under the act of 1847, unless the judgment specify and fix the lien.

Under the act of 1838, authorizing attachments against boats and vessels, the jurisdiction of the district court does not depend upon the strict regularity of the officer's returns, when the proceedings in other respects were fully authorized.

Appeal from Lee District Court.

Opinion by HALL, J. On the 22d day of November, 1847, D. and A. Hine filed their complaint in the district court of Lee county, against the steamboat Kentucky, and issued a warrant to the sheriff of that county, to attach the boat.

The sheriff made the following return to the warrant : "Served the within writ, Nov. 22d, 1847, by attaching the steamboat Kentucky, her tackle, furniture and apparel ; appraised at thirty-eight hundred dollars ; appraisers, Henry Williams, Charles McIntosh."

On the 29th day of November, 1847, William McCall filed his complaint against the steamboat Kentucky, before C. B. Morse, a justice of the peace of Lee county, and upon his complaint, a warrant issued to a constable, who returned the warrant on the same day. "Executed the within writ, by taking the steamboat Kentucky into my custody, as commanded, and, also, I did notify the master of said steamboat Kentucky, by reading this writ to him."

The complaint states that the suit was "brought on a note, executed by the clerk of the boat to McCall, for services rendered by him on said boat, as steward, and that he had assigned the note to Isaac A. Lafever ; that the note bears date the 22d of November, 1847 ; and that the demand accrued to the plaintiff, for wages due him for services rendered the boat, within twenty days last past."

This complaint was verified by the oath of Lafever. On the same day, the justice rendered a judgment against the boat, in these words : "November 29th, 1847. Whereupon came the plaintiff, no person appearing for the steamboat Kentucky, judgment is therefore rendered against the steamboat Kentucky, and in favor of the plaintiff, for the sum of \$96 50, by default, and costs taxed at \$3 22, with interest until paid. It is hereby ordered that the steamboat

Kentucky be sold to satisfy the above judgment, together with her tackle, apparel and furniture, as the law directs." On the 18th of May, 1848, an order of sale issued on this judgment, and on the 29th of May, the steamboat Kentucky was sold, by a constable, to Isaac A. Lafever, for the sum of one hundred dollars. On the same day, Lafever sold the boat to Lewis R. Reeves.

On the 11th of May, 1848, a judgment was rendered in the district court, in favor of D. and A. Hine, for \$190 50 and costs, and an order made directing the sheriff to sell the boat. On the 15th of May, 1848, an execution issued on Hine's judgment, and on the 6th day of June, 1848, the boat was sold, by the sheriff, to D. S. Baker, for the sum of \$825, and Baker put into possession of the boat.

On the 5th day of June, 1848, Isaac Galland sued out of the office of the Clerk of the district court of Lee county, a writ of replevin for the steamboat Kentucky, against L. R. Reeves, D. S. Baker, and fifty-two others, and the boat was delivered to Galland, on the writ.

At the November term of the district court, 1848, Galland was non-suited, and a contest arose between Reeves and Baker, as to whom the damages should be assessed. The district court decided in favor of Baker's title, and upon inquiry of damages, rendered judgment in his favor, and against Galland, for the sum of three thousand dollars and costs. Reeves took exceptions, and brought his writ of error to this court.

The owners of the boat have submitted to the action and judgments of both courts, and the only question presented is, whether the title to the boat passed by the sale of the constable to Lafever, upon McCall's judgment, before the justice, or by the sale to Baker, by the sheriff, upon D. and A. Hine's judgment, in the district court. The title of Baker is based upon the act of December 20th, 1838, and relates to, and takes effect from the day of the seizure of the boat by the sheriff, upon the warrant issued by D. and A. Hine,

the 22d of November, 1847. The title of Reeves to the boat, under Lafever's purchase, will relate to, and take effect from the date of the seizure of the boat, by the constable, upon the warrant issued the 29th of November, 1847, unless the demand and judgment of McCall have the character of a preferred claim, for services rendered the boat, as provided by the act of February 25th, 1847, in which event the sale and title, under that judgment, would be valid, as between these parties, without reference to the time the boat was attached by the officers.

McCall commenced his suit on the 29th of November, eight days after D. and A. Hine had commenced their suit. The suit is brought on a note executed by the clerk of the boat, dated the 22d day of November, 1847, which note was assigned to Lafever, and Lafever becomes the real party to the suit. He swears to the petition and prosecutes the demand. It is alledged in the complaint, that the indebtedness accrued to McCall for personal services, rendered by him to the boat as steward, and that the services had been rendered within twenty days next preceding the 29th of November, 1847, which time would include eight days after D. and A. Hine's warrant was levied, and twelve days anterior to that time. The justice rendered a general judgment against the boat, without referring to or mentioning the subject of the preferred claim or lien of McCall.

The presumption is conclusive, that the suit was brought within twenty days after the services terminated, for the entire demand had accrued within twenty days. The date of the note is not conclusive, that the service had been rendered at the time it bears date, for it could as well include services to be rendered, as services that had been rendered, and the wording of the complaint presents a very fair presumption that such was the fact. It follows, then, that the presumption is quite as strong that the services were rendered after D. and A. Hine's lien attached to the boat, as that they were rendered before that time. If they were rendered after the warrant of D. and A. Hine had seized the

boat, there would have been no lien as against their demand.

But independent of this, the court are of opinion that the judgment of the court should specify and fix the character of the lien, if it is to have the effect of a preferred claim, under the act of 1847. Something more than a general judgment should be rendered against the boat. The judgment should be as specific as the remedy, and clearly state its preferred effect. Unless this rule is correct, it would leave a wide door open for fraud.

The complaint is made, the warrant issued and served, and the default taken, trial had, and judgment rendered on the same day; and probably the same hour. It is easy to put into the complaint, the statement that would make it appear a preferred claim under the statute of 1847. If the boat was liable at all, it would have been the duty of the justice, to have rendered a general judgment,—as in this case,—without regard to the special claim, for a lien under the act of 1847. Then if the specific character of the lien, is to be determined by the complaint, without reference to the judgment, it will be the act of the party bringing the suit, that fixes his lien and not the judgment of the court. The judgment would be the same, whether the demand was in fact preferred or not.

Much time has been occupied in the argument, and many authorities cited to establish an objection to the jurisdiction of the district court in the case of *D. & A. Hine v. the boat*.

It is contended that the jurisdiction of the court depended upon the acts and return of the sheriff on the warrant, and in as much as he had only returned, that he had *attached the boat, &c.*, his return was insufficient, and the district court had no authority to render judgment. We can see nothing in this objection. The warrant issued in the case, was authorized by law, and conferred full power on the sheriff to seize and hold the boat. Clothed with that power, the sheriff did seize and hold the boat. He returned to the court that he had the boat to answer the complaint. The

court adjudged the complaint, and rendered a judgment against the boat, and ordered the sheriff to sell it, to pay the judgment. The sheriff did sell it, received the money, and paid the liability.

If these facts do not show jurisdiction in the court, it would be difficult to define what would show it.

The power of the court is indisputable; the subjugation of the boat to that power, was complete in every step of the proceedings.

Judgment affirmed.

Reeves and Miller, for appellants.

Geo. C. Dixon, for appellee.

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FRINK & CO. v. TAYLOR'S ADMINISTRATRIX.

T. commenced suit against F. & Co. for damages sustained to his person by the upsetting of a stage coach; after suit was commenced, T. died, and his wife was substituted as administratrix of his estate, and filed a supplemental bill. On the trial, the court instructed the jury that plaintiff could recover damages for the injury sustained by her on account of the death of T.; held that this instruction was erroneous; that she could not recover for such injury as administratrix, but that she might do so by a proceeding in her own name and right; that as administratrix she could only recover such damages as her husband might have recovered.

An amended petition should appertain to the same rights of the party plaintiff as the original petition, and should not set up other rights effecting other parties.

Appeal from Jefferson District Court.

Opinion by WILLIAMS, C. J. This cause was commenced in the district court of Wapello county, and the venue

changed to Jefferson county. The suit was brought to February term, 1852, by Telghman A. Taylor, in his own right. His petition of complaint sets forth as the cause of action, "that on or about the 31st day of October, 1851, he became and was a passenger upon the stage coach, then owned by the defendants, which was kept for the conveyance of the United States mail, and for the conveyance of passengers, from Keokuk, in this state, to Ottumwa; and that while petitioner was a passenger in said coach, and one H. White, then in the employment of defendants as driver; the plaintiff charges that the coach was overloaded, and that by careless and negligent driving, the coach was upset, and thereby he was greatly injured; that in consequence he had suffered much, and incurred great expense for medicines and medical attendance, &c., necessary in his affliction; that, from the time of the injury to the time of the bringing of this suit, by reason thereof, he had been confined to his room, and unable to attend to his business as cabinet maker. He also avers that it was in the night time, when the coach was turned over; and that there was but one side light provided for the coach at the time. He concludes by claiming one thousand dollars damages.

The petitioner then procured the issuance of an attachment, by virtue of which the property of the defendants was attached.

After the bringing of this suit, and the filing of this complaint, the plaintiff died. Margaret Taylor, wife of the plaintiff, was then substituted, as administratrix, to prosecute the action; whereupon she filed a supplemental bill of complaint in the action, in which she sets forth the fact that she had been duly appointed administratrix of his estate, and then proceeds to state that, "she claims that there is now due to her, as the administratrix of said estate, from the said defendants, the sum of five thousand dollars, to wit: The sum of one thousand dollars for damages, as set forth in decedent's petition; and the further sum of four thousand dollars for the following grievances: "And your

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petitioner further states and claims that, in consequence of the injury received, as sustained by the said Telghman A. Taylor, deceased, by the act of said defendants, as set forth and contained in said original petition of the said deceased, he,—the said deceased,—from the time of the filing of the said original petition, continued to suffer great pain, and continued to be sick, and was compelled to employ physicians and nurses to take care of, and cure him of the injury so received and sustained by him ; that he had paid out and expended large sums of money to physicians, &c., in attempting to cure him, to wit : the sum of five hundred dollars ; that he continued to be sick and suffer, by reason of the injury, from the 30th day of January, 1852, until the 12th of June 1852, when he died. She then charges that his death was the consequence of the injury received, by the upsetting of the coach, as charged in the original petition.

She then concludes, by praying that the suit may be prosecuted in her name, as the representative of her deceased husband, and that she may have judgment for the said sum of five thousand dollars, with costs, &c.

Afterwards, the original and supplemental petition was amended, so as to allege more specifically the facts relative to the defendant's undertaking, by their agent, to carry the deceased, as a passenger, for the pay, and the negligence of the agent and driver, by which the deceased plaintiff was injured, and his death caused.

Issue was joined, the cause tried, and a verdict rendered for the plaintiff for fifteen hundred dollars, upon which judgment was entered. From this judgment the defendants have appealed.

Several errors have been assigned, on which a reversal of the judgment is urged. However, they all relate to proceedings had in the court below, which refer to, and depend on the same point. This is presented by the third assignment of error, which is that, "the court erred in giving the instructions to the jury, that said Margaret could recover

damages for the injury sustained, by her on account of the death of said Telghman A. Taylor, on this action."

It appears by the bill of exceptions, that such was the instruction given to the jury by the court, upon this question.

This action was commenced and prosecuted by Telghman A. Taylor, in his own right. Pending the prosecution, and before trial had, he died. Margaret Taylor, his widow, administered on his estate; and as administratrix, was substituted as the plaintiff, in his stead, to prosecute his action in the district court, where she thus became authorized, as plaintiff, to proceed with the action; she could legally amend the petition, by leave of the court; or could file an amended petition; at the proper time, provided such petition was of matter appertaining to the *same right* of the party plaintiff, which was contained in the original petition. The Code of Iowa, chapter 104, § 1751, pa. 255, provides that "several causes of action may be united in the same petition, provided, they affect all the parties thereto in the same capacities, and if suit on all might be brought in that county. But the court, to prevent confusion therein may direct all, or any portion of the issues joined therein, to be tried separately."

By the enactments of this section, the legislature have enabled the plaintiff in an action to unite several causes of complaint, in the same petition; but these must "affect all the parties thereto, in the same capacities." It does not go so far as to unite several persons possessing and having distinct and individual rights, to the same action. In this case it is true, that in common with Telghman A. Taylor, the husband and plaintiff, Margaret his wife, had an interest in the action brought by him in his life time. But upon being substituted as administratrix, she became the representative of those interested in his estate, in the prosecution of this action. If damages were recovered in this suit, they would be assets in her hands for their benefit, and she would be accordingly chargeable, as administra-

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trix. He had sued to recover damages for injury, suffering, expenditure of money, loss of time, &c., which had been brought upon him by the illegal conduct of the defendant before his death, pending the suit, she being substituted as his administratrix, could only act in this capacity. But she seeks by her supplemental petition a claim for damages, founded upon his death, upon the allegation that it was caused by the injuries as complained of in the original petition. This we think would be to allow her to blend in the same suit, matters appertaining to her, in her individual right, with those of another and different right. The provisions of the Code have certainly changed the common law practice in relation to the rights of parties in actions; but we do not understand them as having gone so far as to allow parties, who stand in distinct and separate rights and capacities, to unite their interests on the same action.

To recover damages for the loss sustained by her, by reason of the death of her husband, she must resort to an action in her own name, as the matter thereof appertains to her own and separate right. The damages which might be recovered by virtue of the supplemental petition would not belong to the estate, as they are claimed as accruing in consequence of his death; and all subsequent to the original action.

Judgment reversed.

J. C. Knapp, for appellants.

Slagle and Acheson, for appellee.

Shaffer v. Bolander.

SHAFFER v. BOLANDER.

On a contract made in Ohio in 1840, judgment was obtained in this state in 1845, and in 1850 land was sold to satisfy the judgment; held, that the execution defendant cannot avail himself of the remedial laws of Ohio, to avoid this sale; that the *lex fori* must prevail; and that an appraisal of the property under the valuation law was not necessary.

The *lex loci contractus* not applicable to questions mainly remedial.

A purchase at judicial sales depends upon the judgment, levy and deed; these being unobjectionable, an innocent purchaser should not be affected by other irregularities.

Appeal from Van Buren District Court.

Opinion by GREENE, J. John Shaffer commenced this suit in equity, against W. H. Bolander and his son Joel S. Bolander, to set aside the legal title to eighty acres of land which W. H. Bolander had purchased in the name of his son Joel.

The facts in the case show that January 24, 1840, W. H. Bolander gave his two notes to W. C. Goff in the state of Ohio. The next year Bolander moved to Iowa, and in 1844, purchased with his own money the land in question, in the name of his son Joel, who was then about one year old.

In April, 1845, Goff recovered judgment against W. H. Bolander for amount of the two notes and interest, and in February, 1850, the land was, on execution issued from said judgment, sold to G. G. Wright, and in May, 1851, after the period for redemption had expired, it was sold and transferred to said John Shaffer.

In defense of this proceeding the son Joel's answer averred that the sheriff's sale was void, and passed no title because the laws of Ohio, where the contract was

made, required an appraisement before sale on execution.

2. Because the laws of this state, regulating such sale required an appraisement.

To this answer there was a demurrer, under which, the court ruled that the land in controversy, should have been appraised at sheriff's sale, and not having been so appraised, the sale was void and passed no title.

1. *Lex loci contractus* is not, we think, applicable to the merely remedial question involved in this case. The validity of the contract made in Ohio, is not questioned. The debtor could not avail himself of the forms and remedies of the Ohio laws, after departing from their jurisdiction and placing himself under the protecting laws of another state. The doctrine is now too well settled, to be disputed, that the forms of remedies, and the order of judicial proceedings are to be according to the law of the place where the action is enforced, without special regard to the domicile of the parties, or the origin of the liability. Story's Con. of Laws, §§ 556, 557 and 558. 1 Cranch, 259. 8 Peters 361; 13 ib., 378.

The defendant having removed from the jurisdiction of the state within which the contract was made, and having placed himself and his property under the laws of another state, he cannot avail himself of those forms and remedies which he has voluntarily abandoned. As in the proceedings against him, so in his defense the *lex fori*, must prevail.

2. Was the sale void under the laws of this state. The valuation law took effect February, 20th, 1843. This law could not constitutionally apply to contracts previously made, and was modified accordingly in June, 1844. The contract in this case was made in 1840, long prior to the valuation law, and the judgment was rendered after the modification in June, 1844, to wit; in April, 1845, and finally, the law was repealed in 1846, and long before the execution and sale.

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There was not then, at the date of the contract, nor of the execution or sale, any valuation law in force. Hence it follows, that the valuation law, was not applicable.

1. Because it could not impair the obligation of the contract previously made. 2. Because it was not in force at the date of the execution and sale.

But had the valuation law been in force at the date of the judgment and execution, it would by no means follow that the neglect of the sheriff to have the property appraised and sold at two-thirds its value, would render the sale, to an innocent purchaser void. In the language of the supreme court of U. S., "the purchaser, depends on the judgment, the levy and the deed. All other questions are between the parties to the judgment and the marshal" 4 Wheaton, 503 ; 10 Peters, 471 ; 1 Blackf., 210; 2 ib., 295 ; 4 ib., 489 ; 8 John, 366 ; 12 ib., 213 ; 2 G. Greene. 39—44.

In this case there is no objection to the judgment, the levy, or the deed, and hence all other questions were between the execution defendant and the sheriff.

But we are clearly of the opinion, that no appraisement was necessary in this case, and that the court erred, in declaring the sale void.

Judgment reversed.

G. G. Wright, for appellant.

J. C. Hall, for appellee.

Ball v. Humphrey.

BALL et al. v. HUMPHREY et al.

Proceedings in reference to a county road were taken by appeal to the district court, where appellees moved to dismiss the appeal on the ground that application for damages were not made within the time required by law, and because the district court has no jurisdiction over the question of damages; held, that as the county judge had acted upon the question of damages without objection, the appeal should not be dismissed.

The location of a road, where it does affect the rights and interests of individuals as distinguished from the public, is not subject of appeal to, and cannot be reviewed by a jury in the district court, but when it involves a question of damages to the land of an individual, that question may be taken to the district court, and all questions affecting the public only, should be referred back to the county court.

Costs accruing in the district court, should be determined by that court, and should not be referred to the county court.

Appeal from Jefferson District Court.

Opinion by HALL, J. This was an appeal by Ball and others, from proceedings had before the county judge, in establishing a county road, and in the assessment of damages. Humphrey and others petitioned for the road, and Ball and others resisted the establishment, and claimed damages, for reason that the road passed over lands owned by them. The proceedings before the county judge appear to have been regular, up to the time of the assessment of damages, and final establishment of the road, at which time the county court ordered the establishment of the road, upon the condition that the petitioners paid the damages assessed, to the claimants, and the costs. From this decision, Smith Ball and others, to whom damages had been awarded, by the county court, appealed to the district court. On the trial in the district court, the court submitted to the jury the question of damages sustained by each of the appellants

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severally, and refused to submit to the jury, or entertain the question, as to the necessity or convenience of the road for the traveling public.

The appellees moved to dismiss the appeal, because the appellants had not made the application for damages within the time required by law, and because the district court had no jurisdiction over that question, which motion was overruled, and exceptions taken. The appellants except to the ruling of the court, refusing to try the question in relation to the establishing of the road. The district court, after assessing damages, refer the whole matter back to the county court, and make no order in relation to the costs that had accrued in that court, but send it to the county court for disposition.

Both parties now appeal to this court. Ball and others assign for error, the refusal of the court below to hear and determine the question, as to the propriety of establishing the road, and the refusal of the court to render a judgment for the costs that arose in the district court, on the appeal. Humphrey and others assign for error, the refusal of the court to dismiss the appeal, and for assessing damages.

We think there is no ground in the objection that the applicants did not petition the county court for damages in time. The county court decided that question, and acted upon the case, and no objection was raised before that court, or appeal taken from the decision, in that respect.

The propriety or impropriety, of establishing a public road, is purely a question for the public. No one person can have an interest in that question, as contradistinguished from all. True, some persons may use the road more than others, but all are equally interested in its establishment. The private citizen, whose land is taken for the road, has no interest as distinguished from the public; for that purpose, he is a part of the public, and his interest is one in common with all. He is to be paid a just compensation for the land thus taken for the public use. When he has received that

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compensation, or an equivalent for the land taken, he stands in the same relation to the road as the citizen does whose lands have not been taken. His interests, as distinguished from the public, have been extinguished by the payment for the land taken. § 131 of the Code provides for "appeals from the decrees, orders and decisions of the county court, of any matter affecting the rights or interests of individuals, as distinguished from the public." It follows, then, that the locating and establishing of the road cannot be reviewed by an appeal to the district court, and that the court was right in its decision, refusing to submit that question to the jury. The question for damages, for taking the land for the road, is clearly one. When the right of the individual becomes adverse to the public, one must pay and the other must be paid, and the question is how much the one must pay and the other receive?

The interest of the individual is distinguished from that of the public as clearly as can well be conceived. They are emphatically antipodes to each other. From the decision of the county court, upon this question, then, an appeal is allowed, and the court below was right, in submitting that issue to the jury.

We see no objection to the district court's returning the result of the appeal to the county court, for its further action; indeed, we consider this as the proper course, inasmuch as the law contemplates the county court shall keep the archives, and have the control of all matters pertaining to roads.

The district court should have disposed of the costs made in its own court. That cannot be committed to the county court. That court has no power to decide who has to pay them, or provide in any way for their collection or liquidation.

The decision of the district court, ordering the county court to take into consideration the costs, which accrued in the district court, on the appeal, will be reversed, and the case remanded, with directions to the district court, to

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proceed to enter judgment for the costs in accordance with the rights of the parties.

Judgment reversed.

Slagle and Acheson, for appellants.

Charles Negus, for appellees.

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YOUNG *et al.* v. GAMMEL.

Where G. as a tenant in common, with minors who had no guardian at law, made necessary and valuable repairs to a mill, and where the maternal guardian of the minors acquiesced in such repairs; held that G. is not entitled to the exclusive possession of the premises until reimbursed for the amount expended by him for such repairs.

Minors do not possess the legal capacity to dispose of their right of possession in reality by lease or other contract, nor can their natural guardian do so without authority from the proper court.

The power to manage the estate of minors can only be derived from the county court under the Code.

Appeal from Jefferson District Court.

Opinion by WILLIAMS, C. J. Action of right instituted by William Young, David Young and James Young, minors, suing by Matthew Cuny, their guardian, in the district court of Jackson county, to May term, 1852. The petition of the plaintiffs, states, in substance, that they claim of the defendant, John Gammel, an interest and right to the immediate possession of the equal undivided one-half part of the south-west quarter, and the north-east quarter of the south-east quarter of section thirty, in township eighty-five, range four, east, of land situated in the county of Jackson, and state of Iowa; that David

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Young, deceased, the father of the plaintiffs, late of said county, at the time of his death, was seized in fee simple of said land; that said David Young, on or about the sixth day of October, A. D. 1846, died intestate, leaving his widow, John Young, Thomas Young, Elizabeth Jane Young, his children, and his next of kin, and heirs at law living; that said elder brothers, the sister, and the plaintiffs, as heirs at law of said David Young, their deceased father, became, and were seized at his death, as tenants in common, of the aforesaid real estate, in equal proportions; and while so seized, on or about the first day of September, A. D. 1851, the said John Young, Thomas Young, Elizabeth Jane Young, respectively, by quit claim deed or otherwise, conveyed all their right and title to the aforesaid land to defendant, John Gammel, and that he, on or about the first day of October, 1851, entered upon and took possession thereof, with the appurtenances, and from that time has kept, and still continued to keep and hold the possession of the right and interest of the plaintiffs in said real estate; and denies the right of the plaintiffs to the immediate possession of the equal undivided half part thereof, &c.

The statutory writ was issued and served on defendant. At the same court, the defendant appeared, by his counsel, and filed his answer to the petition of plaintiffs, denying that he detained the premises, as stated in the petition, and averring therein that he came peaceably and lawfully into the possession of said premises; and that this suit was commenced without any previous notice to quit being given by said plaintiffs, according to the form of the statute, in such cases made and provided.

Admitting also, that he is the owner of the undivided half of said premises, as stated in plaintiff's petition, and that the plaintiffs are the heirs, of said Young, as therein stated; also that the main value of said premises consists in a mill improvement on the same. That after the death of said Young, the premises were in a very bad condition;

that certain repairs became necessary for the preservation of the property, that he, at the request of Mrs. Young, the mother, and the natural guardian of said minors, as also at the request of the then owners of the other undivided half of the premises, made large expenditures for repairs, which were absolutely necessary for the protection and preservation of said estate; the value of which repairs amounted to the sum of one thousand dollars, that the repairs were useful and beneficial to the premises, and that he is now occupying the same and accounting for the rents and profits thereof at a fair and reasonable value in the improved state. That as yet the rents, and profits, have not been sufficient to pay said expenditure. The answer then concludes with a prayer, that he may be compensated, and placed in *statu quo*, before plaintiffs shall recover possession. The plaintiffs demurred to the defendant's answer, on the grounds that the defendant, in said answer, did not allege that he came into possession of said premises by, and with the consent of said plaintiffs, or any person claiming to be the owner thereof, nor that the relation of landlord and tenant existed in any form or manner between said plaintiffs and defendant. That the answer is uncertain and insufficient.

To the last plea, of defendant's answer, plaintiffs demurred, because it did not appear thereby, that he rightfully made the repairs, for which he claimed remuneration, and therefore to hold said premises, nor that he made the same at the instance, or by the order of any court, or by the authority thereof, which had competent power to grant the same; nor was the same done at the instance and request of the plaintiffs, or their agent, or guardian, or by any other person on their behalf, having legal power, or authority, to contract with said defendant for said repairs.

That it does not appear, by said plea, when defendant took possession, or how long he has been in the occupancy

of the premises; what the amount of the rents and profits is; how, or to whom, he has accounted or is now accounting thereto, or any balance struck in said accounting, and now claimed by him, that said plea is uncertain, &c.

The demurrer of the plaintiffs was overruled by the court. Plaintiff's thereupon rested. "The court, thereupon, ordered and adjudged, that the defendant remain in possession of the said premises, as against the plaintiffs, and those claiming by or under them, until compensation be made to the defendant, for the repairs made by him, for the protection and preservation of the said estate, as mentioned in his answer, and that defendant have, and recover his costs, &c."

The judgment of the district court, as rendered in this case, must be reversed. The demurrer of the plaintiffs, to the defendant's answer, should have been sustained.

It is admitted by the pleadings on part of defendant, that the relation of tenants in common, of the fee simple, to the land exists between him and the plaintiffs, by virtue of a deed of conveyance to him, of the undivided interest of the senior heirs of David Young deceased, the father. This fact being established, together with the minority of the plaintiffs, fixes the rights of the parties in this action. The defendant's answer, furnishes no legal defense to this action. It admits all the material allegations of plaintiff's petition; but seeks to defeat their action by setting up the relation of landlord and tenant; and the necessity of a notice to quit the premises, before action commenced. It then alleges, as a justification for holding the exclusive possession of the premises, that the defendant having gone into possession of the premises in his own right, as tenant, in common with the plaintiffs, who were then minors without a guardian at law, he had made valuable repair so the property, which were necessary, and beneficial, to prevent dilapidation and waste; and that these were made at the request, or by the persuasion of the mother, and natural guardian of the plaintiffs. He there-

by puts himself on the position, for his defense to this action, that he is legally justified in holding the entire and exclusive possession of the lands, so as to work an ouster of the plaintiffs, until they pay him the amount so expended by him in the repairs.

The answer does not, in legal substance, by the facts therein stated, show the existence of the relation of landlord and tenant between the parties. The plaintiffs being minors, did not possess legal capacity to dispose of their right of possession by lease or otherwise, by either express or implied contract. The law would not impose upon them any such liability. In contemplation of law they could neither do nor suffer to be done anything, as of contract, so as to dispose of their right to the estate or the use of it, without the interposing power of the proper court, in accordance with law. The mother being only the natural guardian of the persons of the children, could not control or dispose of their rights in the estate by contract with the defendant. *Combs v. Jackson*, 2 Wend. Reports, 153.

Upon the death of the father, although, the mother becomes the natural guardian of the infants, she must, to enable her to act in the matter of the estate, be empowered, and authorized to do so, by the court. The power to manage the estate of an infant, can only be derived from the county court. Code of Iowa, §§ 1491, 1492, 1493, 1494, 1495. The permission of the mother, who was not authorized by the court to give it, was without legal sanction; and, as to the rights of the plaintiffs, of no effect in law.

What ever may be the equitable rights and remedy of the defendant, they cannot be maintained as set up here, in set-off of the claim of the plaintiffs to possession of the land as tenants in common. To permit it, would be to furnish an easy mode for one tenant in common to encumber the estate of his co-tenants who are minors, and hold them dispossessed, and work at his own option

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a privation of their right. These acts relied on, in his answer, for defense to this action, were done in his own wrong. 3 Watts, R. 238; 4 Kent Com. 369. However necessary the repairs may have been, to preserve the property from dilapidation and waste, he cannot be permitted to defeat the plaintiff's action by pleading his right to remuneration.

However effectual this plea and the authorities adduced and argument of defendant's counsel might be, for remuneration in another case, before a proper person, we think they cannot avail here.

Judgment reversed.

J. B. Booth, for appellant.

Smith, McKinlay, and Poor, for appellee.

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HARLAN v. BERRY.

An unsatisfied judgment against one of the payors of a joint and several note, is no bar to an action against the other.

Where the appearance of the note is the only evidence of an alteration in the date, or where such alteration does not appear to be material, the validity of the note should not be affected.

Appeal from Muscatine District Court.

Opinion by GREENE, J. This action was commenced by Ann Harlan against Thomas S. Berry, on a joint and several note, made by him and one John Brandenburg. The cause was submitted to the court without a jury, and judgment rendered in favor of the defendant, on the ground, as appears by the bill of exceptions, that there

had been a judgment rendered against Brandenburg on this note; and because the face of the note gave some indications of having been changed from the "21 to the 15" day of the month.

The question arises, is either of these grounds sufficient to justify the court below in deciding against the plaintiff's right to recover.

1. The promise made by the note, is both joint and several. Until the note is paid, both parties are *separately* liable. An unsatisfied judgment upon the several promise of one, cannot be a bar to an action on the several promise of the other. In such a case, the two separate judgments would amount, in substance, to nothing more than a joint judgment against both, and the payment of one would operate as a satisfaction of both. This view is fully sustained in *Ward v. Johnson*, 13 Mass., 148.

2. If the *date* of the note was altered, without the consent of the parties, and if such alteration became material, it would, at common law, render the note wholly invalid. But it appears by the bill of exceptions, that there was no evidence given by either party, in relation to the alteration, except the note. This could not show that there was any alteration, after the note was signed, or that it was altered, without the consent of the makers, or that the alteration was material to the makers. Unless these facts appear, the court could not be justified in declaring the note invalid.

Judgment reversed.

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S. *Whicher*, for appellant.

J. *Scott Rickmand*, for appellee.

Wood v. Sands.

WOOD v. SANDS.

In an action against the mortgagee to recover the balance due on the mortgage and note, after applying the proceeds from the sale of the mortgaged premises; it was held, that as the mortgagee had not indorsed the note, there was no cause of action against him.

Appeal from Wapello District Court.

Opinion by HALL, J. On the 14th day of January, 1851, Joseph Thompson executed his note, or contract in writing, as follows: "For value received, I promise to pay Andrew Wood, or bearer, the sum of two hundred and sixty dollars, as follows, to wit: fifteen dollars will be due on the 15th of July next; fifteen dollars on the 15th of January next; fifteen dollars on the 15th of July, 1852; and balance, being two hundred and fifteen dollars, will be due two years from this date."

On the same day, Thompson executed a mortgage on certain real property in Wapello county, to secure the payment of the note. On the back of the note there is indorsed: "I assign the within note to *Mrs. Sarah Coffin*, October 31st, 1851." To this assignment there is no signature.

"For value received, I assign the within, 12th November, A. D., 1851.

SARAH COFFIN."

On the back of the mortgage is the following indorsement: "November 12th, A. D. 1851, for value received, I assign the within mortgage, together with all my right, title, and legal and equitable interest in the same, to David Sands.

ANDREW D. WOOD."

At the April term of the district court, 1853, Sands filed his petition for a foreclosure of the mortgage against Thompson, and made Wood party, and claims judgment against the defendants, for the amount due on the note. The defendant, Thompson, made default, and a judgment

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for the full amount due, was rendered against him, with a decree foreclosing his equity of redemption, and an order of sale against the premises. Wood filed his answer, and the cause was continued. A special execution was issued against Thompson, and the mortgaged premises sold. At the August term, 1853, Wood filed a supplemental answer setting up the foreclosure and sale of the premises. The main defense set up by Wood, in his answer, was that at the time he sold the note to Mrs. Coffin, it was distinctly and positively agreed that it should be without recourse on him; that she was to look to the mortgage alone for the payment, and that, as a consideration, a discount was made on the note of thirty-six dollars. Sands is charged with notice of this agreement before he obtained the note; the answer is sworn to, and the plaintiff is called upon for a sworn replication. To this answer, the plaintiff files his demurrer, which was sustained. Upon this state of pleadings, the court go on and try the case. The plaintiff offered in evidence the note, mortgage and assignments set forth in the petition, which were all the evidence given by either party. Upon this evidence, the court render a judgment against the defendant, for one hundred and thirty-eight dollars and seventy-three cents, it being the balance due on the note, after deducting the amounts produced by the sale of the mortgaged premises. The court ordered that a satisfaction of one of the judgments should be a satisfaction of both.

The defendant excepts to the decision of the court below in rendering the last judgment.

There is no cause of action against Wood stated in the petition; his signature does not appear on the note; and his assignment of the mortgage to Sands creates no liability whatever. True, the petition states that Wood assigned the note to Coffin; but the copy of the assignment attached to, and a part of the petition controls that averment, and fixes the fact that he did not indorse. § 1750 of the Code

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makes these copies essential and controlling in the pleadings.

Judgment reversed.

W. Penn Clarke and *H. B. Hendershott*, for appellant.

J. C. Knapp and *S. W. Summers*, for appellee.

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HUNT v. HUNT.

Section 1485 of the Code, directing an order concerning children after a divorce is decreed, the court in acting "as shall be right and proper," should observe the legal rights of the parents, the child and the community.

Where the child is of such age that it can, without injury, be withdrawn from maternal nursing, the father has legal right to its custody, society and service, and is legally liable for its support and education.

A court should not assume the wardship of a child, unless the parent labors under a moral and natural disability which would disqualify him for the performance of his duties to the child.

The consent of the father that the mother might have the custody of the child for the time being, cannot deprive him of his superior right to the child, no more than such consent would not release him from his obligations to the child.

Appeal from Des Moines District Court.

Opinion by WILLIAMS, C. J. At April term, 1853, John B. Hunt filed his petition in the district court of Des Moines county, praying that the court might make an order, giving him the care and custody of his minor child, Louise Hunt, who was then claimed and held in custody by Mary M. C. Hunt, formerly his wife, but who had, at a previous term of that court, obtained a decree of divorce from the bonds of matrimony contracted with him. The

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court heard the application at April term, 1854. It was overruled, and the order, made at the previous term, relative to the custody of the child confirmed. Thereupon this appeal was taken.

A brief statement of the facts of this case, as presented by the record of the proceedings had upon the application of the appellee, Mary M. C. Hunt, for a divorce, is necessary, in order to a proper understanding of the matter involved by the present application.

At the October term, 1852, of the district court of Des Moines county, Mary M. C. Hunt filed her petition for a divorce from the bonds of matrimony, which had been contracted between her and the appellant, John B. Hunt.

The parties appeared for hearing, and the divorce was decreed, as prayed for. It was made to appear to the court, that the parties had three children. With the acquiescence of the parties, the court ordered that the two oldest, being sons, be committed to the care and custody of the father, and that Louise, the youngest child, should, until further order of the court be made, be consigned to the care and keeping of the mother. At that time, Louise was between three and four years old. Thus the matter stood until the making of this application.

The father, John B. Hunt, now claims that the child Louise be ordered into his care and custody, on the following grounds:

- "1. That he has the paramount right to her.
2. The inability and moral unfitness of the mother to keep and maintain her.
3. The danger of the child contracting a malignant disease of the eyes, which prevails in the family of the mother."

It appears by the record of the proceedings of the application for the divorce, as well as those of the custody of the child, all of which, with the written opinion of the judge, are here duly certified, that the parties have been consid-

ered as holding a respectable position in the community. The judge certifies in his opinion, "that the decree of the divorce was made on the ground of an obvious incompatibility in the tempers and dispositions of the parties, which made it necessary for their happiness and well being that they be separated; that the decree was made without more blame to the one party than the other." It also appears that the parties consented to the temporary disposal of the children, as made by the court.

The court below, in refusing to grant the prayer of the father, acted on the ground, that on the score of capability and moral fitness for the care and keeping of the child, the parties were about equal as to qualification; that the order first made was by consent, and in consideration of the feelings of the mother; in the absence of any exigency requiring the removal of the child from her, it should remain in her custody; that when the parties consented to the arrangement, which was made as to the children, they did not act under any legal disability; and that the title of the father was not paramount in law. The court further took the ground that the child was a ward in chancery, and therefore was properly subject to its discretionary power.

In adjudicating this case, we feel sensibly affected by the consideration of its importance to our state. The apparent facility with which divorces are to be obtained under the Code; the frequency of such applications; the rights and duties of parents in relation to their innocent, helpless and unfortunate offspring, and the community in which they live. The danger of a growing contempt for the sacredness and solemn responsibilities of the marriage contract, imperiously requires that the law should be so administered by our courts, that in addition to statutory facility, a greater, by construction, may not be afforded for the reckless and immoral to abrogate this important principle of the social compact. In the present dispute, rights and

interests of the most sacred character are involved, affecting the parents, the unfortunate infant and the public.

We deem it necessary to notice but one question as presented here. In considering it, the two other points will be, of course, disposed of without special adjudication, as separate propositions. Which has the paramount right to the possession of the person, the care and keeping of the child, Louise? The father or the mother?

On this subject, the provision of the Code is as follows:

"When a divorce is decreed, the court may make such order in relation to the children and property of the parties, and the maintenance of the wife, as shall be right and proper. Subsequent changes may be made by the court in these respects, when circumstances render them expedient."

This provision is general in its terms, so far as it relates to the disposal of the children, and the property, and the maintenance of the wife. The court is to make such order "as shall be right and proper." In the ascertainment of what is "right and proper," it is the duty of the court to observe the legal rights of the parents, the child, and the community. What these are, we will endeavor, briefly as possible, to state.

The law of England, the principle of which, so far as it has not been changed by our statutes is in force here, is "that the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband." 1 Black. Com., 468.

The control of the child, follows as a consequence. 2 Denio, 478-9. The father has legal power over the child until it arrive at the age of twenty-one years. There can be no doubt of the paramount right of the father to the possession, care and control of his minor child, when the child—as this one is—is of such age that it can, without injury or violence to nature, be withdrawn from maternal nursing. But the right of the father to have its society,

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filial affection and service, as well as to see to its health, education, &c., are not the only matters for consideration here. When he is not under some disability, legal or otherwise, the law holds him responsible to the child; and in accordance with the principles of nature and sound morality, makes him answerable for the preservation of its health and its support. He is also under legal obligation to the community in which he resides, to maintain and support his child. See Code of Iowa, title 12, chap. 48, art. 1, § 787 and to 798, inclusive. By these provisions of the statute, the father is placed first in the order of legal responsibility for the protection, support and care of his children. As he is thus held by the law, and it is presumed that natural affection for his offspring must dictate his duty towards it, it is but reasonable to conclude that, to discharge this high trust, which he holds by virtue of the ties of nature, and the obligations of law, he should have the special control, and direct supervision of the interests of the child. Besides, he is liable for the expense which may be necessary for the support and education of the child; and it is his right to see to the proper adjustment and disposal of his means for those purposes.

But, in the disposal of this matter, the court below acted, with a view to the fact, that the child was properly "a ward in chancery," and therefore became subject to the sound discretionary power of the court. It is true that such power is vested in the court. But it will not be exercised except when necessary, from the peculiar circumstances of the case. When it is made apparent to the court that the parent labors under a moral or natural disability, by which he is disqualified, or unable to perform the duties of the relation which he holds, naturally and legally, to the child, it certainly is competent for the proper tribunals to assume and exercise such wardship. This, however, will not be done, when no such disability exists. Such action by the court would be in derogation of the paternal rights and duties. It would tend to render the

duties of the court onerous; and whilst it would, in many cases, release reckless parents from one of the sacred bonds by which they are held to social duty; in others it would rend assunder the ties of natural affection, by which life's bitterest draught may be made endurable.

What are the facts of this case, as certified by the district judge of record here? It is expressly stated that the father and mother are both capable and able to take charge of the child, and to support it. The child is now about five years old, and therefore may be separated from the mother without doing violence to it, on the score of natural support and comfort. Such being the facts, we do not see anything to justify the application of this principle of wardship in this case. The right of the father to the possession and control of the person of his minor child, when his disability is not established, is paramount. See *Wood v. Wood*, 3 Ala., 756; *Jennison v. Graves*, 2 Blackf., 441; *Bell v. Hollenbeck*, Wright, 751. In England, the courts have observed great caution in reference to the rights and duties of fathers in relation to their infant children. In the case of *Rex v. De Manneville*, 5 East., 221, the court refused to deny the right of the father to the possession of his child, though an infant at the breast of its mother, there being no ground to impute any motive to the father which would be injurious to the child. The case of *The People v. Mercein*, 3 Hill's Reports, 399, fully sustains this doctrine. See the opinion of the court, pages 408 and 409.

But the decision of the district court in this case, was made, also, upon the ground that when the decree of the divorce in that court was entered, the parties were present, and in the presence of the court consented to the order which was then made, giving the custody of the infant, Louise, to the mother; and therefore when this application was heard, the judge "felt bound to take cognizance" of the fact of consent, and for this reason confirmed the original order.

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This cannot change and defeat the legal right of the father to the child, so as to bar him from reasserting it, and claiming benefit of it, upon the application. If the father could, by consent on his part, transfer the legal obligation, under which he stood, in relation to his child, to the mother, and thus by so doing, release himself from liabilities which result from the marriage contract, still the order which the court had previously made, in the case of the child, was, as appears by the record, only temporary, leaving the matter open for discretionary action in the future. It was, therefore, no finality, but upon this application, is properly examinable *ab initio*, and he can there revoke such consent upon a proper showing. But could he, by such consent, or any agreement, so dispose of his child, change his relation to it, and discharge himself of his obligations?

In consideration of the rights and duties of the father in relation to his child, he could not. The case here before cited of *The People v. Mercein*, 3 Hill's, R. 411; we think fully recognizes this principle. Judge Brunson there, in addition to what is held to be law on this point by Judge Cowan, says: "The opinion of this court has been repeatedly expressed that, by the law of the land, the claims of the father are superior to those of the mother." He also refers to a former opinion, sustaining the same doctrine, delivered by him in that controversy, in 25 Wend. R., 72, 83. This doctrine is maintained by numerous decisions of courts of the highest authority in this country. *Commonwealth v. Nutt*, 1 Browne, 143; 2 Hill, S. C., 363. *Commonwealth v. Murray*, 4 Binney R., 487; *Dedham v. Natick*, 16 Mass., 135, 140; *Nightingale v. Withington*, 15 ib., 272, 274.

These cases, although some of them involve other questions, all recognize the principle we here maintain; and establish the superior right of the father. We are aware that in this, our day, the spirit of progress is abroad in the land, but, whilst we would not obstruct its onward career to triumph over error and oppression, we think that it is well to

observe and maintain those great and cardinal principles upon which the integrity of the social compact must ever depend. The just appreciation of the rights and duties of the marriage contract, and its incidents, is essential to the existence of civil and christian society.

We fully coincide with the learned judge when, concluding his opinion in the case of *The People v. Mercein*, 3 Hill, 423, he says "that human laws cannot be very far out of the way, when they are in accordance with the law of God."

The order of the court below is reversed, and ordered that the child be delivered to John B. Hunt, the father.

Decree reversed.

M. D. Browning, for appellant.

D. Rorer, for appellee.

Claussen v. Lafrenz.

CLAUSSEN, *Guardian v. LAFRENTZ.*

Where a party appears to have acted under color of title; or has intermeddled only with the lands of deceased, he cannot be regarded as an executor *de son tort*.

Where matters of account affecting heirs relate to the rents, &c. of lands in controversy, and where such account can be adjusted in the action at law in relation to the land, it would furnish no reason for taking the case into equity.

Where a petition does not set out a case of trust nor pray for relief for that cause, it cannot present a case for equity jurisdiction on the ground of trust.

Where a party has an adequate remedy at law, he cannot resort to chancery. The distinction between law and equity jurisprudence is recognized by the constitution, and is not abolished by the Code.

Appeal from Scott District Court.

Opinion by GREENE, J. The petition in this case, was filed by C. R. Claussen, as guardian of the minor heirs of P. C. Burmaster, deceased, against J. H. Lafrenz, who had married the mother of the infant wards. The petition is in chancery, and seeks to recover the possession, rents, profits, &c., of lands. To this petition defendant demurred, on the ground that plaintiff has an adequate remedy at law. Demurrer sustained.

It is claimed that the court erred in sustaining the demurrer, and in dismissing the bill. It is urged that equity has jurisdiction of the cause.

1. Because the defendant is an executor in his own wrong, in consequence of his having taken possession of the lands of a deceased person, which belonged to heirs, and converted the property to his own use. The averments in the petition, do not even intimate facts which could make defendant an executor *de son tort*. They merely show that he took possession of the property by virtue of his marriage, to the mother of the infant heirs. His wife had her interest in the property as doweress, and he as her

husband acquired an interest in her property. There was then some color of title for his possession. It is not pretended that he or his wife claimed, under any fraudulent conveyance. A party in possession of property under color of title, cannot be regarded as an executor *de son tort*. *Densler v. Edwards*, 5 Ala., 31. Besides, no intermeddling with the lands of deceased, will charge a person as executor in his own wrong, because, such interference is a wrong done to the heirs or devisees. *Mitchel v. Lunt*, 4 Mass. 654; *King v. Lyman* 1 Root, 104; *Morrill v. Morrill*, 1 Shep., 415.

2. It is argued that equity has jurisdiction to adjust the matters of account affecting heirs. But as these matters of account relate entirely to the rents, issues and profits of the land in controversy, and as they would be included in an adjustment of rights to the land under our Code, it follows that this would not be a sufficient reason for taking the cause into equity.

3. It is contended that equity has jurisdiction of this case, on the ground of trust. But the petition presents no question of trust. A declaration of trust is made a part of the petition, but that declaration is made by the wife of appellee, in behalf of the wards of appellant, and involves no question that could not be adjusted between the parties in an action of right. Besides, a case of trust is not set forth in the petition, nor does the petition seek relief on that account, and therefore it does not present a case for equity jurisdiction on the ground of trust.

4. In form the petition is in chancery, but the relief prayed for, is fully and adequately furnished at law. When a party has a plain and adequate remedy at law, he cannot resort to chancery. In this case the statutory action of right is sufficiently comprehensive to cover the entire remedy sought, so far as that remedy could be given without affecting parties outside of the petition.

5. The petition is framed with the view of blending law

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and equity, and still without seeking the remedy under the authorized action of right. Under the garb of chancery, it prays for legal rights and the benefits of the statute. It is a proceeding in which law, equity and the statute are so blended and confounded, that it cannot be designated as belonging to either, and this, counsel attempt to justify, declaring that the Code has abolished all distinction in the forms of actions and has removed all demarkations between law and equity jurisprudence.

That the Code has abolished all distinctions in the forms of actions at law, is true; but it is not true that law and equity are blended. The legislature had the power to do the one, but not the other. The constitution declares that, "the district court shall be a court of law and equity." The district court then is invested with all the powers of a court of law, and also with the powers of a court of equity, "and have jurisdiction in all civil and criminal matters arising in their respective district, in such manner as shall be prescribed by law." Here two distinct attributes are attached to the district judge. He is invested with chancery jurisprudence and with all the general powers of a court at law. In conferring these separate powers upon the district courts, the constitution makes an obvious distinction. "Law," is as much distinguished from "equity" as civil matters are distinguished from criminal. As well say that the legislature have power to blend civil and criminal matters into one common form of procedure, without distinction, as to say they do so in reference to the distinction between law and equity.

Again, in confining the jurisdiction of the supreme court, the distinction between law, and equity, is still more broadly defined. Art. 5, § 3; "The supreme court shall have appellate jurisdiction only in all cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may by law prescribe." The constitutional boundary between the law and equity attributes of

the supreme court, is too well defined to be erased or evaded by legislative action. Under the appellate jurisdiction of a chancery case, that court is authorized to investigate it in all its merits and equities, while in an action at law, that court can only correct errors which are patent of record.

In order to bring causes within these defined powers of the supreme court, it obviously follows that the distinction between a case in chancery and an action at law, must be observed, so that the review or correction may come under the appropriate department of the court.

We conclude, then, that the distinction between law and equity cannot be constitutionally abolished, nor do we think that the Code, expressly conflicts with the constitution in that particular. In declaring "all technical forms of actions and of pleading are hereby abolished," § 1733; in stating that the petition must contain a statement of the facts constituting the cause of action, § 1736; and in the provisions in the subsequent sections in relation to the answer, demurrer, set-off, and other pleadings, we can see no determination to blend law and equity indiscriminately in these proceedings. In abolishing all technical forms of actions and of pleadings, it does not follow that the distinction in the two great divisions of jurisprudence is abolished. You may do away with technical forms in actions at law, and dispense with technical forms of pleadings in equity, and still, the fundamental principles and distinctive features of law and of equity remain unimpaired.

Although several causes of action may be united in the same petition, § 1751; they must be either on the law, or chancery side of the court. This and the other sections of the Code to which we are referred, were no doubt intended to harmonize with the constitution. This intention is the more apparent from the fact that there is nothing in the language of these sections calculated to confound the distinction between those widely different jurisdictions. There is no such intention expressed in the Code, and certainly it cannot be justified by inference or intendment.

Claussen v. Lafrenz.

Those sections of the Code to which we are referred with so much apparent confidence by counsel for appellant, have obvious reference to actions at law, and make no allusion to cases in chancery. Indeed there is but little in the Code referring to, or attempting to regulate chancery practice. In this state, then, we must look mainly to established works on equity jurisprudence, pleadings and practice, to guide us in chancery proceedings.

The cases referred to by appellant, are not applicable to this state. There is not only a great difference between their Code and ours, but there is also a radical difference between their constitution and ours. We therefore cannot consider the decisions from New York, in any way applicable to this case.

We conclude that the court below ruled correctly in sustaining the demurrer.

Decree affirmed.

Grant, Cook and Dillon, for appellant.

G. C. R. Mitchell, for appellee.

FRANKLIN INSURANCE CO. v. MCCREA *et al.*

Where an insurance policy stipulated that the company should not be liable to pay the loss till after sixty days, and where the petition was filed against that company before that time; held, that this premature proceeding might be corrected by a supplemental petition.

Any want of validity in the notice upon the agent of an insurance company is waived by subsequent appearance.

A court of equity having acquired jurisdiction over the subject matter for one purpose, may be invested with jurisdiction for other purposes, even when they pertain in part to courts of law, so as to secure complete equity and justice between the parties.

Appeal from Lee District Court.

Opinion by HALL, J. This was a petition in chancery by McCrea and others, to reform a marine policy, issued by the company, and also for a decree for the amount of the loss incurred. The notice was served upon the local agent of the company, who keeps an office in the city of Keokuk, Lee county. By the terms of the policy, the company are not liable to pay the amount of a loss that might arise, until after the expiration of sixty days from the time the loss occurred. This petition was filed before the sixty days had elapsed, and consequently before the company were liable to pay.

The defendant below made a special appearance, and moved to dismiss the petition on the ground that a service could not be made upon a foreign corporation by service upon a local agent; and also demurs to the petition, on the ground that the alledged loss was not due at the time the suit was brought.

The petitioners obtained leave of the court, and filed a supplemental petition setting forth that sixty days have expired since the loss under the policy, and averring that the sum is due, and praying for complete redress by a reformation of the policy and decree for the amount due.

Franklin Insurance Co. v. McCrea.

Defendant demurs to the supplemental bill. The demurrer and motion to dismiss both the original and supplemental bill was overruled by the court. The defendant appeals from those decisions.

The question as to the validity of the notice upon the agent of the company is fully waived by their subsequent appearance and pleading. The petition, as originally presented, contains sufficient matter to give the court jurisdiction in chancery. It is within the peculiar province of that court to correct mistakes, and relieve against errors of this kind, and having got jurisdiction for that purpose, they would have the power to go on and complete the remedy, even though, by so doing, they decided upon matters purely pertaining to courts of law. The only question which the case presents is, whether the plaintiff can, by supplemental petition, so bring forward matter that clearly belongs to a court of law, and thus claim its equitable and legal services, upon the principle that the court having jurisdiction for one purpose, will retain it for all purposes, and do complete and equal justice to all parties. Upon principle we can see no objection to this course, and the authority in 1 Page Chy. R., 168 ; Story's Equ., &c., §§ 336, 339, appear to sanction this view of the case.

The decision of the court below will be affirmed, and the cause remanded for further proceedings.

Decree affirmed.

Claggett and Dixon, for appellant.

Reeves and Miller, for appellee.

Cheuvete v. Mason.

CHEUVETE *et al.* v. MASON.

The separate answers of several defendants, being under oath, and denying all the material allegations of the bill, are sufficient to defeat the bill in the absence of any reliable proof to the contrary.

Fraud will not be presumed; it must be proved.

Where it appeared that the contract for a working interest in a "lead" was in the wife's separate name, paid for with her own money, and all proceeds received and arrangement conducted in her own name and right; held, that the circumstances establish her separate ownership of the "lead," and that parties having full knowledge of all the circumstances, could not hold said working interest or the proceeds thereof to satisfy a debt against the husband.

The right of a married woman to acquire, possess and control property in her own right and for her own benefit, and that it cannot be taken to pay the husband's debts unless left under his control without notice of the real ownership, are fully recognized by the Code.

Although the defendant answered to the bill, still if a demurrer would hold against it, a court will not, in general grant the relief sought."

Appeal from Dubuque District Court.

Opinion by WILLIAMS, C. J. Lewis J. Mason filed his bill, against defendants, in chancery, to the October term of the district court of Dubuque county, 1853. The bill sets forth that at the spring term of the district court of Clayton county, in this state, complainant had obtained judgment against Baptiste Cheuvete, for the sum of two hundred and ninety-eight dollars and twenty-five cents, with costs of suit; and that before the commencement of this suit, he obtained two other judgments against the said defendants, before one Vincent Reynolds, a justice of the peace of the county of Clayton, amounting in all to about fifty-five dollars, all of which remains due; that the said Baptiste, Margaret, his wife, John Connelly, Narcessa Bouett and others, have combined and confederated together to cheat and defraud complainant; that the said Baptiste Cheuvete, about one year since, struck a mineral "lead" near the

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town of Buena Vista, in Clayton county ; that he has continued to work the same ever since himself, and in his own name, raising and selling a large amount of mineral therefrom, to wit : to the amount of more than one hundred thousand pounds, as his own share ; that he sold it and had received the proceeds, amounting to about two thousand five hundred dollars, in his own name, and for his own use and benefit ; that he had loaned a portion of the money, so made, about two hundred and fifty dollars, to one John Connelly, who knowing that said money belonged to said Baptiste, and not to Margaret, his wife, gave his note therefor to her, in her own name, as of her own right, with the concurrent design of the parties to cheat and defraud complainant and others, creditors of the said Baptiste ; that the sum of seventy-five dollars was, in like manner, loaned to one Narcessa Bouett, of Dubuque county, being the property of said Baptiste, and not of Margaret his wife ; also that, in like manner, one hundred dollars were loaned to one Uzeb Bouett of the county of Dubuque.

The bill further charges that said Baptiste Cheuvete, and Margaret, his wife, had combined and confederated with one Uell Little, to cheat and defraud complainant, and other creditors of the said Baptiste ; and for that purpose he, the said Baptiste, had transferred and made over all his property to said Little, consisting of the aforesaid debts and demands, and also all his other property and effects of every kind and description ; that said Little had received the deeds and other instruments of conveyance in writing, without paying any consideration therefor, with purpose and design of cheating and defrauding complainant ; that the property so transferred is worth one thousand dollars.

The petition concludes with the prayer that said Baptiste Cheuvete, Margaret Cheuvete, his wife, John Connelly, Narcessa Bouett, Uzeb Bouett and Uell Little may, each and all, be made defendants in this action, and be compelled to answer under oath as to the charges contained in the

complaint specifically. The bill is sworn to and attested in due form.

An attachment was issued and served by attaching property, &c., in the hands of garnishees. The parties, by their attorneys, appeared, and, by agreement, released the property, and dismissed the garnishees. It was also agreed that Baptiste Cheuvete was indebted to the plaintiff in the sum of two hundred and ninety-eight dollars and twenty-four cents; whereupon judgment was rendered against him for that amount and cost.

The defendants appeared and answered separately, under oath, as required.

Margaret Cheuvete, after admitting that she is the wife of Baptiste Cheuvete, and that she and her husband were very poor and had no property, except a few of the indispensable housekeeping utensils, proceeds to state, in her answer, "That after commencing a residence at Buena Vista, she had borrowed money on her own individual credit, to enable her to keep house; that she kept boarders, took in washing, and exerted herself, in every way she could, to earn money with which to support herself and children; she denies that Baptiste Cheuvete struck a "lead" near the town of Buena Vista, as alleged in complainant's bill; but she avers that Daniel Little, Uell Little and Charles Hoffman were, and still are the owners of certain lands near Buena Vista; that she is informed, and still believes, that they discovered said "lead;" and that neither the said Baptiste, nor she, had or have, anything to do with "striking" said "lead;" that after said "lead" was struck by said Daniel and Uell Little and Charles Hoffman, she, together with one James Garrison, rented the ground, on which said "lead" was situated, of the owners, for the purpose of working it; that she, thus, in her own name and right, acquired a working interest of one-fourth in said "lead;" that one half of the mineral raised was due to the owners of the "lead;" and the other fourth was the property

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of her co-tenant, and that the working of the "lead," as to her share, was carried on by herself, in her own name and right, and the proceeds of the same was her separate property, with which the said Baptiste had nothing to do; she avers that from first to last she worked said "lead," received the proceeds in money, paid her share of the expense in her own name and right, without the control of her husband; she admits that her husband sometimes worked at the "lead," as he pleased; but denies that he worked or carried on the "lead" in his own name, or had any right or property in it, or the working interest thereof. She admits that she loaned sums of money to the persons named in the petition, and took notes and security in her own name, which money was of the proceeds or profits of the "diggings," and avers that she loaned it as her own money, without any intent to cheat, defraud, or hinder or delay the creditors of her husband; she also avers that said money was loaned prior to the time when said Mason, the complainant, purchased the demands which he claims to be now due from the said Baptiste; and further answering, she avers that she has, in like manner, loaned money to the said Lewis J. Mason, the complainant in this suit; and that he well knew, long before he purchased said claim against said Baptiste, her husband, that said "diggings," and the proceeds received by this defendant therefrom, as well as the money loaned by her to said Mason, complainant, and Narcessa Bouett, and others, named in the bill of complaint, was the sole and separate property of respondent; she then alleges that, if it were true that the property and "lead" were, as alleged, held and controlled as his, by the said Baptiste, so as to cheat and defraud creditors, which she denies, that said Mason, by reason of the last averment here made, is estopped from alleging the said fraud, or from claiming, in any manner, the said property or proceeds of the same, because if any fraud in law, or in fact, had been committed, the said Lewis J. Mason was, and is, himself a party to the same; she further answers, that the said Uell

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Little had paid her the full amount of the several notes of Narcessa Bouett, Uzeb Bouett, John Connelly and Lewis J. Mason, amounting in all to about the sum of five hundred and twenty-three dollars; and that she had expended said money in purchasing the working interest of her said partner, James Garrison, and in improving said "diggings," and for necessary expenses of the family; that since her purchase of the entire working interest in said "lead," from said Garrison, she has not realized any profits therefrom; that her share of said "lead" was not 'one hundred thousand pounds' of mineral, but was only seventy-five thousand pounds; that the expense of working the "lead" is very great," &c.

We have here given the substance of the answer of Margaret Cheuvete, entire, as verified by oath, and filed in the case, which supersedes the necessity of setting forth that of the answers of the other defendants. They all answer under oath, denying any combination, or confederation, to cheat and defraud the complainant and other creditors of Baptiste Cheuvette, as alleged in the bill, as far as they were concerned in the matters and things stated in the complaint, and fully sustain the answer of Margaret, as to all the material allegations thereof. The answers of the several defendants deny all the material allegations of the complainant's bill, as to fraud, and set up the separate right of property, and ownership of the working interest, in the lead, in Margaret, the wife of Baptiste Cheuvete, as a full and complete defense to the action. Such are the pleadings of the case.

The evidence of several witnesses is adduced by complainant, showing that Baptiste was engaged and assisted in working the "lead;" that he took some part in making the contract of purchase of the working interest, with the owners of the land, and that when the time arrived, and the parties met to have the writings of contract made, he then informed the parties that the contract must be written as made in the name of Margaret, his wife, and not in his

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name; that she, and not he, was the contracting party; also, that he had in conversation, as to his circumstances, stated that he was in debt; that the claims purchased by the complainant, Mason, were unjust, and he was not willing to pay them.

A decree was entered by the district court in favor of the complainant, and against the defendants, "for the sum of three hundred and eighty-nine dollars and fifty-four cents, and cost. And it was further adjudged and decreed that the defendants, Margaret Cheuvete and Uell Little deliver over and surrender up to the district court for the use of the plaintiff, all evidence of indebtedness, that they or either of them have or hold against John Connelly, Uzeb Bouett and Narcessa Bouett, at the time of the service of notice on them, or either of them, on or before the next term of the said district court; and in default of so doing, that the further judgment of four hundred dollars be entered against them, for the use and benefit of the said plaintiff, against the said Baptiste Cheuvete, and others." 7

Of the questions which are presented in this case for decision, two only, need be particularly considered.

1. Is the charge of combination and confederation, by the defendant, to cheat and defraud the complainant, and other creditors of Baptiste Cheuvete, as laid in the bill, satisfactorily established?

2. Is the property, money and effects of the mineral "lead," sought to be charged with the indebtedness of Baptiste Cheuvete, the husband, the separate and rightful property of Margaret his wife; and can she hold, use and control the same, as she may choose, free from any liability on account of her husband's debts?

After a thorough examination of the evidence of the case, adduced in support of the plaintiff's bill, we are unable to find proof, sufficient to sustain the charge of fraudulent combination by the defendants. The answer of Margaret Cheuvete, taken together, with the answers of the other defendants, being all under oath, in accordance with the

statute, denies all the material allegations of the plaintiff's bill; and in the absence of evidence by disinterested witnesses furnishing good and substantial ground, in contradiction of the answers, present a sufficient defense to the plaintiff's action. We find nothing in the evidence which might not fully consist with a bona fide separate ownership of the working interest in the "lead," by the wife of Baptiste Cheuvete, and the control of the effects belonging to it, and the profits arising therefrom. The facts that the contract for the working interest thereof was made and written in her name; that she paid for it with her own money, that she received, and in her own and separate right and name loaned the money made from her share of the profits of the mineral raised, *to the plaintiff himself*, prior to the commencement of this action; and also before he purchased the judgment debts, for the collection of which this proceeding was instituted, as well as her loaning money to others, go strongly to establish her separate right to, and ownership of the lead. The public assertion of her true position in the matter; and especially notice thereof to the plaintiff, establish the equity of the case. If the express and positive denial of the fraudulent combination, furnished by the answers of the defendant's had not been made, and the case had been left for decision on the evidence of the plaintiff alone, fraud and combination to cheat, as charged in the bill of the plaintiff would not be clearly made out without the aid of presumption, in violation of the well established rule of law. "Fraud must be proved, not presumed." In the absence of any corroborating proof, the occasional remarks of the husband Baptiste Cheuvete relative to his indebtedness—his presence at the time of the execution of the written contract for working the mine, and the fact that, with others, he worked the "lead" at times, cannot prejudice the rights of the wife. Particularly is this so, when the answers to the bill and the evidence of the case, fully establish the facts that she paid for the interest in the mine out of her separate and individual means, the

avails of her own energy, industry and toil. That the contract was made in her separate name and right; and that she alone controlled the avails and profits of the minerals by acts of contract in her own name entirely, without being joined by her husband. All these facts were matters of public notoriety in the neighborhood; of which also the plaintiff had before he became the creditor of the husband, special and personal notice. He had been her debtor for a loan of money, which she had procured as her share of the profits of the "lead," and he had dealt with her, in relation thereto, in her own separate right and name. We find nothing in the evidence when taken with the pleadings of the case, to warrant the conclusion that there was any fraudulent combination, or confederation, on part of the defendants as charged in the plaintiff's bill.

In considering the first question here presented, the fact of separate claim and ownership of the mineral "lead," and the use of the avails thereof, by Margaret the wife, have been necessarily adverted to. It is only necessary in disposing of the second question, to consider the rights of the woman as to separate property and the use thereof, during coverture as secured by the law of this state.

The Code of Iowa, husband and wife, Chapter 84, § 1447, p. 218, provides that "the personal property of the wife does not vest at once in the husband, but if left under his control, it will in favor of third persons acting in good faith and *without knowledge of the real ownership*, be presumed to have been transferred to him except as hereinafter provided."

Sections 1448 and 1449, then proceed to make provision for the preservation of her separate property and effects from liability for the husband's debts where such property is left under his control, by requiring her to file it of record with the recorder of deeds of the county, so as to give notice of her ownership to all persons. This done in case of the husband's death, she becomes a preferred creditor of his estate over all other creditors, except such as gave

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credit to the husband, after the property was placed under his control, and before the filing of such notice *unless they had knowledge of her rights.*

By the provisions of our Code the right of a married woman to possess and own property and use and control it for her own benefit, free from the control of the husband, and without liability for his debts in their own and separate capacity, is fully recognized and protected.

In this case the evidence establishes the fact of separate ownership and use of the property by the wife. The knowledge of this fact by the plaintiff, by the transaction of business with the wife, in full recognition of her right is also established; and in the absence of sufficient evidence to sustain the allegation of fraudulent combination, we think the defendants are protected under the provisions of the Code, as far as this plaintiff is concerned.

We have taken this view of the case, and have adjudicated it upon the bill, answers and evidence, without a special consideration of other points raised by the counsel for defendants not deeming it of importance to put the case for adjudication upon them. By doing so, however, we do not pass them as trivial. We consider that the bill of the plaintiff does not show a clear case for equitable jurisdiction. The record does not show that the plaintiff had fully executed his remedy at law, against Baptiste Cheuvete, the debtor. It is true on this point the defendants did not demur in the court below, but "in general if a demurrer would hold to a bill, the court though the defendant answer, will not grant relief upon hearing the cause." Story's Equi. plead., §§ 446, 447.

We also consider that the transcripts of the record of the judgments against Baptiste Cheuvete which are made part of the bill to prove the indebtedness, and the amount thereof, are defective in the authentication, and do not meet the requirements of the Code.

The decree of the court below as entered, is not such as answers to the facts of the case as claimed by the bill, if it

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had been good in equity, and had been sustained by the evidence. These last mentioned points, we have not deemed it necessary to consider specially, for the reason that the plaintiff had failed, on the merits of the case at large, to show that he is entitled to the relief in equity which he seeks.

Decree reversed.

P. Smith and *J. Burt*, for appellants.

L. A. Thomas, for appellee.

NEALLY v. WILHELM, *et al.*

Where N. contracted with W. to sell him a cow, and W. directed the cow to be delivered at his slaughter house, under the stipulation that he would pay as much for her as if he had previously seen her, and where N. delivered the cow as directed, and W. not finding her as good as he expected, directed her to be turned loose, whereby she was lost; held, as the sale was absolute and the price only conditional, that W. was liable to N. for the value of the cow; held, also, that if the sale had been conditional, he would still be liable as bailee for gross negligence.

Appeal from Des Moines District Court.

Opinion by GREENE, J. This suit was commenced before a justice of the peace, by M. W. Neally against Wilhelm and Ramge, for the price of a cow. On final trial, in the district court, judgment was rendered in favor of defendants.

It is urged that this decision is erroneous, and that appellant should recover the value of the cow. The evidence in the case shows that John Wolverton, as Neally's agent, made an arrangement with Wilhelm & Ramge to

sell them the cow in question; that they first agreed to go out and see the cow, but did not; that they afterwards told the agent to deliver the cow to them; that they would give just as much for the cow as if they went out to see her; that they directed the agent to deliver the cow at the slaughter house, and if neither of them was there, one of the hands would take charge of her; that the cow was delivered accordingly at the slaughter house, to one of the hands, and secured in the yard, and the agent departed. Soon after, Wilhelm came to the slaughter house, and after inquiring about the cow, directed his man to turn her out, on the ground that she would not make good beef. The cow was accordingly turned out, and was never afterwards heard of. Neally's witness swears that the cow was in good order for beef. The man who received her, swears that she was not. The evidence shows that the cow was worth about fourteen dollars. The question to be decided is, which of the parties should suffer the loss of the cow.

The agreement with Neally's agent was unconditional. He was to deliver the cow to defendants, or their man, at their slaughter house, and they would pay as much for her as though they had previously seen her. The cow was delivered accordingly into their possession, and thereupon they became liable to Neally for the value of the cow.

But it is claimed that the cow was not fit for beef, and that therefore they were under no obligation to take her. The evidence in relation to the condition of the cow is equally balanced. The price was dependent upon the condition of the cow, the sale was not. The delivery and sale were unconditional, and the price conditional. If the cow was not as good as recommended, they could abate the price accordingly.

After their unconditional direction to the agent to deliver the cow, and after he had gone to the expense and trouble to bring her a distance of ten miles, it was their duty to

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take the cow and fix a price upon her. From the moment they took possession of her either in person or by their agent, they became liable for her value.

This liability would attach to them even if the sale had been conditional. They authorized the delivery of the cow into their possession. If she was not what they contracted for, they should have notified Neally's agent, or should have returned her to his possession.

By their own consent and direction, they became bailees, and as such, are liable for the loss resulting from such gross negligence.

Judgment reversed.

Bronning and Tracy, for appellant.

L. D. Stockton, for appellees.

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COBURN v. MAHASKA COUNTY.

In a case of bastardy under the Code, the county court is authorized to take from the father of the child, such security as may be directed by the court to save the county and every other county in the state from all charges for the maintenance of the child; but in addition to this security, the county court has no authority to require a quarterly payment to the county treasurer; and to correct such unauthorized requirement a writ of *certiorari* may be issued from the district court.

A writ of *certiorari* is authorized where the inferior tribunal has exercised judicial powers not authorized by law, and where there is no other plain-speedy and adequate remedy.

Appeal from Mahaska District Court.

Opinion by HALL, J. This was a petition to the district court of Mahaska county, for a writ of *certiorari* to the

county court, to certify of certain decisions, rulings and judgment rendered in that court on a complaint of bastardy against Coburn.

In the examination of the petition of Coburn to the district court, we find numerous causes set out why a writ of *certiorari* should be granted. We shall only examine the cause with reference to one ground set forth in the petition.

It appears that on the trial before the county court, Coburn was found to be the father of the bastard child, and directed to give security, in the sum of five hundred dollars, conditioned to save the county, and also every other county in the state, from all charges towards the maintenance of the child. And further, that said Coburn, pay to Henry Blackburn, treasurer of said county, or his successor in office by the first day of July following, the sum of ten dollars, and ten dollars quarterly thereafter for the term of five years for the support of said child, unless sooner relieved by order of the county court.

Section 852 of the Code, limits the power of the county court when the accused is proved by the court or jury to be the father of the child, to a mere "judgment that he give security, as directed by the court to the county, conditioned to save the county and also every other county, in the state from all charges toward the maintenance of the child." This is all the county court can do. That part of the judgment that requires the defendant to pay ten dollars quarterly into the county treasury, is illegal and unauthorized by the Code. If the defendant appeals to the district court, and "is found guilty or confesses the accusation in the district court, then he shall be charged with the maintenance of the child in such sum or sums, and in such manner as the district court direct," and shall be required to enter into a bond to the same effect as that required before the county court. § 855, of the Code.

We have nothing to do with these singular provisions of the Code. We have only to give a fair interpretation of

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the language, and from this, it is clear, that by appealing from the judgment of the county court, the defendant, if found guilty by the district court, may be charged with the payment of a sum or sums of money for the support and maintenance of the child, which the county court in the exercise of its original jurisdiction had no power to require.

It is obvious that if the defendant appeals this case in order to avoid the unauthorized and illegal part of the judgment of the county court requiring him to pay ten dollars quarterly into the county treasury, for the support of the child, that he only takes the case to a tribunal, where the unauthorized judgment of the county court, will, by the action of the district court, become authorized and legal. He appeals from the "*frying pan to the fire*." This would not afford an "adequate remedy." An appeal would afford no remedy whatever. The defendant may be willing, and it is his privilege and right to submit to the authorized judgment of the county court, but unwilling to submit to the unauthorized part of its judgment. He has no remedy whatever to avoid this, only by a writ of *certiorari*.

The Code, § 1965; gives this writ, in all cases, "where an inferior tribunal, board or officer exercising judicial function, is alleged to have exceeded their proper jurisdiction or is otherwise acting illegally, when in the judgment of the court applied to for the writ, there is no other plain, speedy and adequate remedy." In this matter the county court was "exercising judicial functions," it "exceeded its proper jurisdiction," it "acted illegally." There "is no other plain, speedy, and adequate remedy," for the defendant.

The writ of *certiorari*, should have been allowed by the district court.

The decision of the district court refusing the writ, will therefore be reversed and the cause remanded with direc-

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tions to allow the writ as demanded, and to proceed to hear and determine the cause.

Judgment reversed.

E. W. Eastman and *Samuel A. Rice*, for appellant.

HUMPHREYS v. HOYT, *et al.*

A motion for a new trial is addressed to the sound discretion of the court, and should be refused unless a strong meritorious case is shown.

Where, by consent, a jury is waived and the facts are submitted to the finding of the court, on a motion for a new trial, the case is to be considered the same as if tried by a jury.

Where, by the Code, a party is required to answer under oath, such answer is to be considered evidence in the case, of equal weight with that of a disinterested witness.

A new trial will be granted when it appears that the merits of the case have not been justly tried and that injustice has been done.

Opinion by WILLIAMS, C. J. James A. Humphreys instituted his action, on a promissory note, against Azor Hoyt, Robert Holmes and Henry Ristine, for the sum of one hundred and eight dollars and fifty-six cents, dated the 13th day of December, 1852, payable six months after date. He filed his petition in accordance with the statute; and the cause was tried at the October term, 1853, of the Linn county district court.

The defendants, Holmes & Ristine were sued, with notice. They appeared and filed their answer, denying indebtedness to the full amount, as claimed by plaintiff in his petition. They then proceed, by their answer, to aver that the note specified in plaintiff's petition, was given to him by Azor Hoyt, as principal, and them as his sureties; and that they were entitled to a credit thereon for about the sum

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of twenty-one dollars; and also, that they believed that sometime in the month of June, then last past, said Hoyt had paid to the plaintiff, on account of said note, the further sum of forty dollars, for which they claimed credit. They then called upon the plaintiff to answer as to these allegations of payment, as set forth by them, under oath, as provided by the Code of this state. The facts of payment, as set forth in the answer of the defendants, Holmes & Ristine, are stated as matters of which they were informed by Hoyt, who, at the time of answering, was not within the jurisdiction of the court.

The replication of James A. Humphreys, under oath, is accordingly filed. By it he denies that the payments, or either of them, were made on the note, as stated in the answer of the defendants. He then proceeds, therein, to state that about the sum of twenty-one dollars and ten cents had been paid to him by Hoyt, which sum had been fully settled for on other accounts; and that the same was not to be credited on said note; that the sum of forty dollars, which had been paid to him by the said Hoyt, was not paid to him to be credited on the note, on which this suit is brought; but that the same was paid by said Hoyt, as the agent of S. A. and H. Hoyt, daughters of said Azor, against whom he, Humphreys, held a note for the sum of thirty-eight dollars and fifty-three cents, and also an account for about nine dollars and ninety cents, with direction from Hoyt that the same should be applied on the note and account of his daughters, having been furnished by them for that purpose; and also that Hoyt had never directed him to apply the said sum of forty dollars as a credit on the note here sued. He also states that the forty dollars were applied by him in payment of the note and account of S. A. and H. Hoyt, as directed; and that said Hoyt never paid to him any other money whatsoever.

[This is the state of the pleadings, as presented by the record up to the time of trial. The bill of exceptions,

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taken on the trial, shows that the plaintiff, after producing the note in evidence to the judge, to whom the cause was submitted, by consent of the parties, without the intervention of a jury, rested his case. The defendants, to sustain the issue on their part, introduced A. J. Humphreys, who testified, "that about the 16th of June, then last past, he was present at the time the said Azor Hoyt passed the forty dollars to plaintiff; that no other person was present but the plaintiff, said Hoyt and witness; that plaintiff then held a note of \$38 50, and also an account against S. A. and H. Hoyt, daughters of said Azor Hoyt; that Hoyt said to plaintiff, when he paid the sum of forty dollars that the same belonged to the girls, S. A. and H. Hoyt; that it was all the money they could raise at that time, and that he paid it as agent for them; that plaintiff was to give the girls credit for the \$40 00; that there were no directions given by said Hoyt, at the time the money was paid, to credit the amount, or apply it on the note sued in this case; but upon paying the money he asked the plaintiff to sign a receipt; cannot say what the paper was; plaintiff refused to sign the paper; Hoyt, upon finding that the plaintiff had credited it, as he did, became angry, and the parties separated." The bill of exceptions then concludes as follows: "There was no evidence to prove that after the parties had separated, or any time, Hoyt told the plaintiff to credit the \$40 00 dollars on the note in question. There was circumstantial evidence tending to show that some time after the payment of said sum, and the giving of the credit for the same to the account of the girls, Hoyt wanted to have the said payment apply as a credit on the note in controversy; but no evidence tending to prove that he ever consented to make such change, or credit said \$40 00 on the note in question. The bill certifies the foregoing to be the substance of all the evidence in the case. The court thereupon gave judgment, applying the \$40 00 as a credit on the note in question in this suit, and deducted the amount thereof from plaintiff's claim."

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Plaintiff's counsel then moved for a new trial, on the ground that "the judgment was against the evidence and law of the case."

The motion was overruled, and judgment accordingly entered.

The question presented here on this appeal, is as to the overruling of the motion for a new trial. This necessarily involves the judgment of the case by the district court, upon which that motion was made. All the evidence of the case is certified to this court in due form, and we will proceed to consider it.

The counsel for the appellees has urged upon this court that "a motion for a new trial is addressed to the sound discretion of the court, and should be refused, unless a strong meritorious case is shown. To sustain this position he cites the decisions of this court. The cases of *Powers v. Bridges*, 1 G. Greene, 244, and *Millard v. Singer*, 2 G. Greene, 144, certainly do sustain this position, as also do the numerous authorities cited in those cases. He also adduces decisions by the courts of Tennessee and Illinois. Decisions to the same effect might have been read from all the states of this union. Such is the doctrine of the books. Does this case come within the rule of these decisions? We think it does. We will examine it and see how the rule applies.

We will consider the case as we would, had it been tried by a jury, having been submitted to the court for trial, in accordance with the provisions of the Code, which are as follows: "Issues of fact shall be tried by the court, unless one of the parties require a jury," § 1772. Section 1823, of the Code, also, provides that "the provisions in this title relative to juries, are intended to be applied to the court, when acting as a jury in the trial of a cause, so far as they are applicable, and not incompatible with other provisions herein contained." The case is to be considered as if a jury had tried it. *Gilmore v. Ballard*, 1 Scam., 252; *Stringer v. Smith*, 1 Scam., 295.

What, then, are the law and evidence of the case, as presented by the record. The only matter of controversy here, is the \$40 00, which the defendants seek, by their plea, to claim as a credit on the note sued. By their plea they—availing themselves of the provisions of the Code, for the purpose of proving this credit, on the note—call on the plaintiff to reply, under oath, to their plea. Here is the language of the Code :

“The plaintiff, in his petition, may, at his option, require the answer of the defendant to be given under oath. And in like manner, the party filing any subsequent pleading, setting forth new matter, may require the reply thereto to be given under oath.” See Code of Iowa, § 1744.

“Sec. 1745. Any pleading, thus required to be made under oath, shall be considered as evidence in the cause, of equal weight with that of a disinterested witness, provided it be sworn to by the party himself, who was called on to answer, but not otherwise.”

The replication of plaintiff, to the plea of the defendants, is then the evidence of a disinterested witness on the subject matter in dispute, made so by the voluntary act of the defendants, by virtue of the Code. He stands as their witness in the case, unimpeachable on the score of interest. The evidence of the replication was clear and conclusive as to the fact that when Hoyt paid the \$40 00 to plaintiff, he said it was to be applied to the account of his daughters, as a credit; that it was their money; and that he paid it as their agent; and also that there had been no payment made by Hoyt on the note upon which the suit was brought.

In addition to this, there is nothing of record, on part of the defendants as pleading, which denies, or in any manner puts the facts of the replication of the plaintiff in issue; so that, taken as an ordinary pleading, it should have been answered; or otherwise it is to be taken as admitted and true. Code of Iowa, § 1742.

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The testimony of A. J. Humphreys, who was called by defendants, proves that the \$40 00 were applied as a credit, on the account of S. A. and H. Hoyt, in compliance with the request of Azor Hoyt, who informed Humphreys, the plaintiff, at the time, that he acted, in the matter, as the agent of the girls; and that the money was theirs. It is true that Humphreys was asked by Hoyt to sign a receipt, which he had drawn up, and Humphreys refused to do so; that Hoyt left him and seemed angry. This witness also states that, at that time, Hoyt did not ask Humphreys to apply the \$40 00 as a payment on the note, upon which this suit is brought. This is the only witness in the case, and these are the facts of the testimony as certified.

It was incumbent upon the defendants to make their plea of payment good by evidence of its truth. We think they have not only failed to do this, but, that the testimony given by themselves, clearly establishes the fact that the \$40 00 were applied to the payment of the indebtedness of S. A. and H. Hoyt, at the request of Azor Hoyt, as their agent, and with the understanding that the money belonged to the girls. What the peculiar character of the receipt was, which Hoyt wanted the plaintiff to sign, does not appear, nor does it particularly appear what was the cause of Hoyt's anger when they separated. The fact that Hoyt afterward may have wished to change the application of the money, cannot alter the matter, as Humphreys never consented to do so.

It seems to us that the evidence, most conclusively, defeats the defense set up by defendants' plea.

The principle that where a person is indebted to the same creditor on several and different accounts, he may elect as to the application of a payment, cannot apply in this case, for two reasons. The first of which is, that the evidence is that the money paid was not his own, but belonged to the girls, for whom he acted as agent in the matter; and the second that he had no other indebt-

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edness on his own account but the note here in suit. He could not properly apply their money to payment of his own indebtedness.

We have considered this case with much care, in view of the principle heretofore recognized, on the subject of new trials. Whilst we would not interfere with the ruling of the district court in a case admitting of some reasonable doubt as to the proper exercise of that discretion, which is recognized by law; still, in a case like this, where the pleadings and the evidence are fully brought before us, clearly establishing, as we think, beyond doubt, that the ruling of the court is erroneous, we feel it to be our duty to exercise that power which vests in us, by reversing the proceeding. We think the plaintiff has brought himself within the rule, by showing "a strong meritorious case."

A new trial will be granted where there are strong probable grounds to believe that the merits of the case have not been fully and fairly tried, and that injustice has been done. *Wheeler v. Shields*, 2 Scam., 348; *Cunningham v. Magoun*, 18 Pickering, 13; *Polk v. The State*, 4 Miss., 544; *Jones v. Jones*, 4 Blackf., 140; *Bybee v. Kinnette*, 6 Missouri R., 53; *Weatherford v. Wilson*, 2 Scam, 253; *McKee v. Ingalls*, 4 Scam., 30.

The rulings of the district court are reversed and a new trial is awarded.

Judgment reversed.

I. M. Preston, for appellant.

Isaac Cook, for appellees.

ROOP v. SEATON.

Where a cause of action on a written instrument had accrued, but was not barred at the time the Code took effect, the time allowed for the commencement of the action would be five years from July 1, 1851.

The non-joinder of one of two joint payors of a promissory note, cannot be set up as a bar to the action in the answer, but would be good cause for demurrer.

A petition seeking to recover against one as on a several promise, cannot be supported by a joint note against two which contains no several promise.

Appeal from Mahaska District Court.

Opinion by GREENE, J. This action was commenced by William Seaton, against B. Roop, on two promissory notes, one of which became due August 3, 1845, and the other August 3, 1846. The notes were joint and signed B. & W. C. Roop. The petition was filed September 3, 1852. The defendant's answer set up ; 1 The statute of limitations. 2 That the defendant could not be sued alone on the joint notes described in the petition. This demurrer, was overruled and judgment rendered against Roop, for the amount of the two notes.

1. Were the notes barred by the statute of limitation? At the time the Code took effect, the right of action was not barred against either of the notes under the Rev. Stat. The Code declares in reference to the limitations of actions, that when causes of action have already occurred, and are not yet barred, the time allowed for the commencement of such actions shall not be less than one-half of the period prescribed in the Code, §§ 1671, 1672. The time prescribed on written contracts, is ten years. It follows that the right of action on their notes would not be barred till five years elapsed from the time the Code became operative, and therefore not till July 1, 1856. Upon this point then, the answer was demurrable.

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2. The petition is against B. Roop alone, but seeks to recover upon a joint note made by B. & W. C. Roop. The Code provides that persons severally liable, or jointly and severally liable on the same instrument, may all or any part of them be joined in the same action, §§ 1681, 1682. But not so with persons jointly liable only on the same instrument. As the notes were joint only, the action upon them, should have been joint. W C. Roop, should have been joined. But can this non joinder be set up in the answer as a bar or defense to the action? We think not. This objection should have been raised by demurrer to the petition. Upon both points then, the demurrer to the answer was properly sustained.

3. On the trial, defendant objected to the introduction of the joint notes as evidence in an action against him alone. But the court overruled the objection and admitted the notes in evidence. In this we think the court erred. Where the petition seeks to recover against a single individual upon a several promise, as upon a joint and several promise, a note, containing a joint promise only, shows too wide a variance to be admissible in evidence.

Judgment reversed.

Charles Negus, for appellant.

G. G. Wright, for appellee.

Gillis v. Matthews.

GILLIS v. MATTHEWS.

Where a demurrer to a petition is as sustained, and an amended and correct petition thereupon filed, this court will not review the ruling below in reference to the original petition.

Appeal from Lee District Court.

Opinion by HALL, J. Joel Matthews filed his petition in chancery, against Wm. Gillis claiming a specific performance of a contract for the conveyance of a tract of land. The contract was executed by L. E. Johnson, as agent for Gillis. Gillis demurred to the petition, principally on the ground that the petition did not show authority in Johnson to execute the contract set forth in the petition, and upon which the performance was claimed. The court below overruled the demurrer, and Matthews obtained leave to amend his bill, and during the term filed an amended bill. The defendant Gillis, took exception to the decision of the court overruling the demurrer, and appealed from the decision of the court.

We have not examined the question as to the correctness of the court in overruling the demurrer. The amended petition supersedes the original petition and the cause of complaint is now fully presented in the petition, as amended. The complainant in effect abandoned the original petition, and left nothing pending on that petition by which the rights of the defendant, can be prejudiced. We can see no reason for interposing to reverse or affirm a decision of the court below, the effect of which has been wholly obviated and released by the acts of the party in whose favor it was made. We cannot see that either party have any interest in the question unless it is a curiosity to know what this court would decide ; a curiosity that we shall not gratify.

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The appeal is dismissed, and the cause remanded to the district court with direction to proceed upon the petition as amended

Appeal dismissed.

Claggett and Dixon, for appellant.

Reeves and Weller, for appellee.

PITKINS *et al.* v. BOYD.

Where the petition commencing the action was filed, and a writ of attachment issued on the same day, it will not be presumed that the attachment was issued before the action was commenced.

Under the Code, the petition need not claim or assume any particular form of action.

If the averments indicate a substantial ground of action, it is sufficient.

An attachment bond may be good, although not executed by the plaintiff in the action.

The petition for an attachment may be sworn to by any person qualified to be put under oath.

Where the averments in a petition are positive and do not claim to be the result of information; and where the affiant swears "that the matters and things set forth in the foregoing petition are true, so far as the same are matters of personal knowledge; and so far as the same are matters of information he verily believes them to be true;" held, that the latter clause is surplusage and cannot invalidate the affidavit.

The provision of the Code authorizing an attachment on a debt before due, does not apply to a non-resident.

Appeal from Jackson District Court.

Opinion by WILLIAMS, C. J. This cause, together with four others, viz: M. D. Gillman, C. O. Thompson & Co., Swope & Hubble and Jewett, Gates & Johnson, each as plaintiff against Thomas A. B. Boyd, defendant, were tried at the April term of the district court of Jackson county.

The proceedings are the same in all the cases, and by

agreement of counsel, the judgment of one is to be decisive of each and all of them, in this court. The questions of law in all being identical.

Pitkins and Pitkins & Co., commenced their action, by petition, in assumpsit, against Boyd, for merchandize sold and delivered to him, on an account stated, alleging an indebtedness of eighty-seven dollars and eighty-three cents, unpaid. Process of notice in due form was issued and served on the defendant, and at the same time an attachment process, under the Code, was also issued, and property attached. The parties appeared for trial in the district court. The defendant's counsel moved the court to quash the writ of attachment for the following reasons :

" Because no action had been commenced, or was pending at the time of suing out the writ of attachment in said case.

" Because the writ of attachment does not show whether it was issued in an action founded on a note or contract ; and for that reason furnishes no guide to the sheriff, as to the amount of property to be attached on said writ.

" Because no bond has been filed in said cause, as required by § 1853 of the Code of Iowa ; the plaintiff's attorneys having no authority to sign his name to the bond, no action having been commenced at the time of the signing of the bond, as aforesaid.

" Because no inventory of the property attached by the sheriff, on said writ, has been taken and returned by the sheriff.

" Because the petition for the attachment is not sworn to by the plaintiff, but by one C. O. Thompson, who does not state that he had any knowledge of the matters alleged in the petition, nor what means of knowledge he had of the same."

The motion was sustained by the court, and the writ accordingly quashed, and a bill of exceptions taken.

An appeal to this court is taken, and, on argument, submitted to us for adjudication on errors assigned.

The error assigned here, is as to the ruling and judgment of the district court, on the motion to quash the writ of attachment. The same reasons which were urged in support of the motion to quash in that court, are now presented here for adjudication, excepting the fourth, which has been abandoned by defendant's counsel.

The Code, § 1846, we think, is decisive of the first point raised and here urged to sustain the ruling of the court below. It is as follows :

"In an action for the recovery of money, the plaintiff may cause any property of the defendant, which is not exempt from execution, to be attached at the commencement, or during the progress of the proceedings, by pursuing the course hereinafter prescribed."

Section 1847, provides that if the writ of attachment be issued after the commencement of the action, a separate petition must be filed ; and that the proceedings by attachment shall be only auxiliary to those of the action.

In this case, the writ of attachment was issued on the 16th day of January, 1854, upon affidavit made and bond filed the same day. The petition commencing the action was also filed at the same time. They appear, by the record, to be simultaneous acts. Such being the state of the case, we are of the opinion that a proper construction of the Code, as above cited, authorizes this proceeding by attachment, as had "at the commencement of the action." The objection, that the writ was issued before the commencement of the action, is not supported by the record. The Code clearly contemplates the issuance of the attachment writ, at the commencement of the action or afterwards ; and, if the latter, requires that it be done upon petition to the court. The commencement of the suit, and the proceeding by attachment, bearing date the same day, it would be going farther than a fair construction of the provisions of the statute would warrant, to presume that the attachment issued before the proper process of the main action, to

which it is auxiliary, was issued. On this point, we think the objection to the writ is without cause.

The second ground of objection to the legality of the attachment proceeding, is that it does not appear from the writ whether the action, to which it is sought to be made auxiliary, is of *tort*, or *ex contractu*.

The Code has dispensed with the common law form, in commencing an action in the district court. § 1733 provides that "all technical forms of actions and of pleadings are hereby abolished;" and § 1734 that "any pleading which possesses the following requisites shall be deemed sufficient :

1. "When, to the common understanding, it conveys a reasonable certainty of meaning.

2. "When, by a fair and natural construction, it shows a substantial cause of action or defense."

Section 1735 is as follows : "The first pleading on the part of the plaintiff is the petition, which must contain a statement of the facts constituting the cause of action, as well as a claim of the remedy sought. If money be the object of the action, the amount demanded, must be stated."

In this case, the plaintiff has commenced his action by petition, in compliance with the provisions of the above sections of the Code, for the recovery of a specific sum of money, being the price of goods, wares and merchandize sold and delivered to the defendant, which remained due and unpaid. In the concluding part of the petition, he states that the defendant is a non-resident of the state of Iowa, in accordance with the Code, § 1848, and prays for the issuance of a writ of attachment in the case. The facts stated in the petition are sworn to by one C. O. Thompson.

In the body of the writ of attachment, which bears date on the same day with the filing of the petition, the amount of indebtedness and the non-residence of the defendant, &c., as stated in the petition, are set forth, so as directly to refer and relate to the petition. As the Code, in providing for the writ of attachment, does not require that the nature of

the action to be set forth in the writ, but simply authorizes that proceeding in actions of *contract* or *tort*; and, as the relation of the writ, in this case, to the petition is manifest, we think it would be ultra-technical to quash the proceeding on this ground. The petition, as required by the Code, contains a substantial ground of action, *ex contractu*; and the auxiliary relation of the writ of attachment to the main action, is in the spirit of the law, sufficiently apparent.

The third ground of objection to the attachment proceeding relates to the signing of the bond. It is urged that Spurr and Kelso, the attorneys of Pitkins and Pitkins & Co., the plaintiffs, who executed that instrument in their name, had no authority to do so. We do not deem it necessary to discuss and decide this question specially here, as it must be disposed of in deciding the next question, and thereby become immaterial.

The next point made in objection to the legality of the attachment proceeding, involves that immediately preceding. It is, that the attachment bond is not good and sufficient in law, because it is not signed by the plaintiffs, as principals, but by their attorneys, for them. Whether the plaintiff signed it at all, is immaterial, under the provisions of our statute. The bond is signed and executed in due form, by two persons of whose capacity and responsibility, there has been no doubt raised. On this point, the enactment of the Code is as follows: § 1853. "Before any property can be attached as aforesaid, the plaintiff must file with the clerk a bond for the use of defendant, with sureties, to be approved by the clerk," &c.

The word "*surety*" is defined by Webster, in his dictionary, to mean "certainty—indubitableness—security—safety." "Security against loss or damage—security for payment; and in law, one who enters into a bond, or recognition, to answer another's appearance in court; or for his payment of a debt; or for the performance of some act, and who, in case of the principal debtor's failure, is compellable to pay the debt or damage, as a bondsman; a bail."

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There is nothing in the statute requiring the party plaintiff to sign the bond. He is merely required to "file with the clerk a bond for the use of the defendant, with sureties." The record shows that he did file it, with two responsible men as sureties, with the proper conditions, &c. The language used by the Code, does not necessarily require the bond to be executed by the plaintiff, signed either by himself, or agent, or attorney, with sureties. He was only required to "file a bond for the use, &c., with sureties." This view consists with sound reason. All that need be done, in a case of this kind, is "to secure the defendant from loss or damage," in consequence of the proceeding. This certainly may be done as well without the signing of the bond by the plaintiff, as with it. Besides, cases often occur, of an absent plaintiff, and otherwise. It would sometimes be inconvenient, and, perhaps, impossible to procure the timely execution of a bond, if his signature were requisite to its validity. The bond, in this case, meets the demands of the Code; and, so far as the manner of its signing, and the parties, obligors therein, are concerned, it is binding on them, and is valid. They are as much "sureties" in the true meaning of the statute, without the name of the plaintiff there, as with it. This being the opinion of the court, on this point, the last one alluded to above is of course immaterial.

The next and last reason urged for quashing the writ, relates to the affidavit accompanying the petition. The objection is raised that "the petition is sworn to, not by the plaintiff, but by one C. O. Thompson, who does not state that he had any knowledge of the matter of the petition, or his means of knowledge."

It is only necessary to cite the provision of the Code on this subject, which is as follows: § 1448. "The petition which asks an attachment must, in all cases, be sworn to," &c. In it, there is nothing designative of the particular person who must make the affidavit. Any person, of legal capacity to be a witness, and who knows the facts necessary

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to the procurement of the writ, can make it. But it is urged, that being a stranger to the proceeding, and not the party plaintiff, he had no means of knowing the facts of the petition. This objection cannot hold. It does not follow that, because a man is not a party to the proceeding, he may not know the facts necessary to its validity; the facts of indebtedness; the amount due; the non-residence and intent to defraud, may all be known by the agent or clerk of a plaintiff, when the party might not know any of these things. Therefore the statute merely requires the facts to "be sworn to."

It is also urged that the affidavit is defective in this: "The affiant swears that the matters and things set forth in the foregoing petition are true, so far as the same are matters of personal knowledge; *and so far as the same are matters of information, he verily believes them to be true.*" The objection is, that the affiant does not set forth the means and facts of information. We have only to say here, that the affidavit refers to the facts stated in the petition, in verification of them; and, that these facts are all affirmed, positively, as of the knowledge of the affiant himself, and not as derived by information otherwise. The latter clause of the affidavit, having nothing to apply to, in the petition, is to be taken as surplusage of form, merely, and treated as if not there. It cannot invalidate the affidavit.

It is also contended that in the case of C. O. Thompson against this defendant,—being one of those here adjudicated, in which it is stated that a part of the indebtedness was not due at the time of commencing the action and suing out the writ—the petition does not state, as sworn to, "that defendant refused to make any arrangement to secure the debt when it would fall due." To sustain this proposition, the Code, § 1852, is cited. That section provides, "that the property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness; and when the

petition, in addition to that fact, states that the defendant is about to dispose of his property with intent to defraud his creditors; or that he is about to move from the state, and refuses to make any arrangement for securing the payment of the debt when it falls due; and which contemplated removal was not known to the plaintiff at the time the debt was contracted.

The facts presented by the petition and affidavit, in this and the other cases at bar here, are the "non-residence of the defendant Boyd, and his intent to defraud his creditors," not that he is about to remove from the state, &c. We are of the opinion that this provision of the Code does not apply to this case; but only to that of a contemplated removal from the state. This section is intended to afford a remedy to a creditor when a debt is not due, and the debtor is about to remove from the state, without making any arrangement to secure it when due.

There are two classes of cases, specially provided for, in this section of the Code. For the security and recovery of debts contracted, but not due and payable, at common law, where time only is wanting to fix the indebtedness absolutely, in order to proceed against the debtor, on the ground of fraudulent design to avoid the effects of his contract. These cases belong to neither of them.

There are other matters which appear to have been raised and presented, in the court below, as part of the proceedings, but which were left without final action there. These we have not considered; indeed, they have not been urged here. Having carefully examined and considered these cases, with an eye to the importance which attaches to all summary procedures of this kind, and with a sense of our duty, as expounders of statutory law, to so construe it as to give it proper effect, we are of the opinion that the judgment of the district court, quashing the attachment proceeding, is erroneous.

The judgment of the district court is therefore reversed,

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and this, and the cases submitted with it, remanded for further proceeding in the district court.

Judgment reversed.

Clark and Bissell, for appellants.

Smith, McKinlay and Poor, for appellee.

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BREWINGTON v. ENDERSBY.

Reading the notice to the adverse party, of the time and place of taking depositions, is sufficient service, where no copy is demanded.

Appeal from Van Buren District Court.

Opinion by GREFENE, J. This was an action of replevin by Charles Brewington against Frederick Endersby. Verdict and judgment for the defendant. On the trial below, several exceptions were taken, and one of these is now urged as error.

The plaintiff moved to exclude the depositions in the case, because the notice to take them was only read to him without leaving a copy.

The Code requires reasonable notice of the time and place selected for taking depositions, but gives no other direction in relation to the notice. § 2446. When not otherwise provided, notice required by law must be in writing, § 2493. The service may be personal, or left at the usual place of residence as provided for the service of the original notice in civil action. § 2496. Such "service is to be made by reading the notice to the defendant, and giving him a copy if demanded." § 1721.

In this case the notice of the time and place of taking the

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depositions, was served by reading the notice, and as it does not appear that a copy was demanded, the notice must be considered as sufficient.

• Judgment affirmed.

G. G. Wright, for appellant.

A. Hall, for appellee.

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SHUCK *et al.* v. VANDERVERTER.

In an action on an attachment bond, the remarks of the defendant at the time he procured the writ, not admissible to show his motives.

Appeal from Davis District Court.

Opinion by HALL, J. Vanderverter brought suit against Shuck and Jones, before a justice of the peace, on an attachment bond upon which there was a trial, and judgment for plaintiff. The defendant's appealed to the district court.

On the trial in the district court, the plaintiff gave in evidence, declarations of the defendant Shuck made some time before the levy of the attachment, tending to show that the suing out of the attachment was wilful and wrong. To rebut which the defendants offered to prove by the magistrate what Shuck said at the time he applied for the attachment. The plaintiff objected to this evidence. The court below decided that it was not admissible, and the defendants excepted. This ruling of the court is affirmed for error.

On the part of the appellants, it is insisted that what Shuck said when he sued out the attachment was a part of the *res gesta* and as such admissible to prove his motive and rebut the charge that the suing out of the attachment, was wilful.

To make the attaching creditor liable upon the bond, it is necessary for the obligee to prove that the attachment was sued out without cause, and was therefore wrongful. If he proves that the defendant knew that there was no cause, then it was wilful and entitles the obligee to exemplary damages. The only questions are, was there cause; if not, did the obligors know that there was not cause. How then can the declarations of the obligors at the very moment he is doing the act, be called a part of the *res gesta*? How can he by his words give character to his acts, the propriety or impropriety of which depends upon facts that have transpired, and exist independent of anything that he can say or do. A man who is about to commit a wrong cannot by words spoken when he is about to do the act, qualify or avoid the consequence.

The *res gesta* of this case, was the absence of cause, for suing out the attachment and the knowledge of the defendant, substantially a negative proposition. The defendant could say nothing that could give it character or qualify in his favor the true force of facts and make evidence in his favor.

If this was permitted, a man about to sue out an attachment could avoid liability by fixing his defense at the time he procured the attachment.

The Code, § 2399; lays down the rule, "that when a part of an act, declaration, conversation or writing is given in evidence by one party, the whole or the same subject may be enquired into by the other." This rule is as liberal as the rules of evidence have ever given.

We are of the opinion that there was no error in the ruling of the court below. The judgment will therefore be affirmed.

Judgment affirmed.

D. P. Palmer, for appellants.

J. C. Knapp, for appellee.

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The district court has jurisdiction in all cases of divorce and alimony, in the county wherein the plaintiff resides, even in cases where it appears that the cause of action arose outside of the county or state.

Section 2497 of the Code, authorizing the service of notice through the post office, when the parties reside at different places, between which there is regular communication by mail, should be strictly observed, and courts should carefully guard against any abuse of its provisions.

A notice addressed to Mrs. R. L. Smith, to a post office in a city where she had been always known and addressed as Mrs. Asahel L. Smith, is not sufficient, when it was known by the party sending the notice, that she was absent from said city.

In order to give the court jurisdiction in a case of divorce, the plaintiff's residence in the county must be *bona fide*, and not merely for the purpose of obtaining a divorce under the laws of Iowa.

The Code, in reference to divorce, should be strictly enforced, and the requirements fully observed.

Appeal from Dubuque District Court.

Opinion by WILLIAMS, C. J. On the 10th day of August, 1853, Asahel L. Smith, filed his petition for a divorce, in the district court of Dubuque county, praying that the bonds of matrimony as contracted by him, with his wife Rosetta L. Smith, might be dissolved. The petition is in the usual form, and sets forth that the parties were married on or about the 14th day of January, 1836, at Watertown, Jefferson county, in the state of New York. That they had continued to live together as husband and wife, until the month of January, 1853. The causes of complaint, upon which the application is founded, are, inhuman treatment, such as to endanger his life, and refusal and failure on part of the said Rosetta, to perform the duties of the marital relation; extravagant and wanton expenditure of his means, so as to encumber him with debts; and a series of facts exhibiting a violent and ungovernable temper, without cause, so that he could not live in peace and happiness with her; and that their mutual welfare required their separation.

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The petition proceeds, at great length, with a statement of facts and instances of misconduct and abuse, on her part, without provocation, and an averment of performance by him of all the duties of a good and kind husband. It also sets forth, that they have living three children, one fifteen years, one seven years, and one two years old. That he has provided for their comfort and support, and wishes to educate and bring them up in life, so as to be from and without the influence of their mother. He also avers, that he has been for six months preceding the time of filing of his complaint, a resident of the state of Iowa. He concludes with a prayer for a divorce from the bonds of matrimony and relief according to the nature of the case.

It appears of record, that a notice in due form of the filing of the petition citing the respondent, Rosetta L. Smith, to appear and answer to the complaint, was issued, and put into the sheriff's hands on the 10th day of August, 1853, and on the same day returned by him "not found."

A like notice was also published in the *Miner's Express*, a newspaper published in the city of Dubuque, for four weeks consecutively from the 31st day of August, 1853, as appears by the affidavit of the editor and publisher of that paper.

The notices required the defendant "to appear and answer on or before the 4th day of October, 1853, or otherwise judgment would be entered against her."

It also appears of record, that the petitioner Asahel L. Smith, to show service, made affidavit as follows: "That R. L. Smith, the above named defendant is residing in Syracuse, in the state of New York, as he is informed and believes. He further states, that on the 1st day of September, 1853, he mailed to the said R. L. Smith, a copy of the petition and also a copy of the notice in said case. That said letters were directed to the said R. L. Smith, at Syracuse, her place of residence; and that he deposited the letters containing said copies in the post office at Dubuque,

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on the date aforesaid. . This affidavit bears date October 4th, 1853.

On the 4th day of October, 1853, the cause was called for hearing. The petitioner appeared by his counsel. The respondent not appearing, a default was entered, and the divorce as prayed for decreed.

On the 19th of January, 1854, a writ of error, *coram nobis*, was issued on the application of Rosetta L. Smith, returnable to the March term of district court of Dubuque county, in the case. When the parties appeared for hearing thereon, with testimony to establish grounds of merit. The respondent, Rosetta L. Smith, by her counsel, moved the court to set aside the decree of divorce granted at the last term of the court, on the complaint of her husband, Asahel L. Smith, against her for reasons in her application on file; and further protested against the said proceeding.

1. For the want of jurisdiction in the court.

2. The want of sufficient notice that should be legally binding on her; and she protested against the proceedings generally. After argument had, the court decided that it did possess jurisdiction of the case; but also set aside the decree of divorce, entered at the previous term, and allowed the defendant to come in and file her answer, and make defense to the petition.

To this ruling of the court, exception was taken by the counsel for both parties, whereupon the case is appealed for adjudication in this court.

The following are the assignments of error, filed by defendant's attorney.

1. The court erred in overruling the motion of the defendant, asking the court to refuse jurisdiction of the case, when it appears by the record. that the cause of action arose out of the district where the suit was commenced.

2. The court erred in deciding that the defendant could be brought into the courts of Iowa, against her consent by a service through the mail, directed to her in New York.

3. This court erred in entertaining jurisdiction of the

cause, without evidence that the plaintiff had a residence in Iowa, but when the contrary expressly appeared, that he never had a residence in the state.

We will consider the assignments of error in the order in which they are presented.

The point made by the first assignment of error is settled by the statute in express terms. The *residence* of the plaintiff in the county, is made the requisite in establishing the jurisdictional power of the district court in cases of divorce. Chapter 86, § 1480; provides that "the district court in the county where the plaintiff resides, has jurisdiction of all cases of divorce, and alimony, and of guardianship connected therewith."

There is nothing in the terms of this section which confines the power of the court to marriages or causes of complaint, which may occur within the county or the state where the suit is commenced, but its provisions extend to "*all cases of divorce*," &c. The contract of marriage and action of divorce, by the provisions of our Code, are considered as transitory. As such, the subject is treated by our courts in the same manner that other matters of contract of that nature are. We find no constitutional objection to interfere with this position. Besides, to make the action local, would work manifest hardship in many cases. The court being satisfied of the *residence* of the plaintiff, had power to proceed to the trial of the case, upon the proof thereof, in compliance with the statute.

The second assignment of error, is well taken in the case as presented. The Code provides as follows, on the subject of notice by mail:

"When the party making service, and he on whom it is to be made reside in different places between which there is a regular communication by mail, service may be made by directing the paper properly through the post office, and paying the postage thereon. The paper shall, in that case, be deemed served at the time at which the next

regular mail would reach the place of residence of the party on whom it is to be served." § 2497.

The party who resorts to this kind of notice, must be held to a strict and faithful compliance with the statute, and courts will be careful to guard against any abuse of its provisions which might result in unfairness. Upon the hearing *coram nobis* in the court below, to which we find no valid objection in law, the defendant shows by proper evidence, that the plaintiff knew that she was for the time being sent by him to Oswego. That he had left her, stating that he was going to California, that their home had been broken up in Syracuse, so that it was to say the least of it, uncertain whether the notice and papers would reach her as addressed to Syracuse, New York. In addition, however, to this, the name by which, according to his own affidavit of service, he addressed them to her is proven to be different from that by which she had been known, and to which she had responded, from the time of their marriage, which was then about eighteen years. Taking the case all together, this matter of notice by the mail being addressed to Mrs. R. L. Smith, when she had been, since her marriage always known, and addressed by written communication as Mrs. Asahel L. Smith, savours strongly of design, by fraud, to thwart and defeat the intention of the law. Although we consider the evidence on this subject sufficiently establishes the fact, we are confirmed in this conclusion by the extraordinary conduct of the plaintiff as proven, throughout his procedure for the procurement of the divorce. The affidavit of Mrs. Smith, as to her ignorance of his application and proceedings for the divorce, until after it had been decreed, we think, is fully sustained by the evidence of other witnesses; and fixes the character of the transaction too plainly, to permit it to receive legal sanction. To do so would be to give legal effect to fraud. Such service did not give the court proper legal jurisdiction of the person of the defendant.

The third assignment of error is also well taken. Sec-

tion 1480, of the Code makes "the residence of the plaintiff, within the county," an indispensable requisite to give the district court jurisdiction "in all cases of divorce and alimony." Such residence must be *bona fide*. A mere temporary sojourn, for a season, *in transitu*, without intent of domiciliation and citizenship, is not what we understand by the *residence* contemplated by the legislature. It certainly could not have been intended by the legislature, that a malcontent of marriage contract, wishing to be freed from its sacred obligations, should be permitted in a clandestine manner, to leave his family and home in another state, where the law would enable him to adjust his rights, and redress his grievances, if any existed; where the parties, to such proceeding both resided and could be fairly and fully heard, where the acts of complaint if any, all transpired, and the testimony could be most conveniently procured and come to this state for the sole and specific purpose of remaining here six months to set up a residence, that he might procure a divorce, and then return.

Such preliminary changes of venue, at the option of a party to the marriage contract, we opine, cannot be sustained by either the letter or spirit of our Code. To give such effect to it, would be judicial condemnation of the wisdom and morality of the legislature. The evidence of the case establishes the fact, by the statement of the plaintiff, that he had been advised by an attorney that he could procure a divorce more easily in Iowa, than in any other state; and that he had been staying in Dubuque long enough for that purpose, and no other; that he was on his return to the state of New York, and would never live with his wife again.

In the case of *Hunt v. Hunt*, decided at this term, we have expressed our unwillingness to add to statutory facility that of loose judicial construction, to aid in the procurement of divorces from the marriage contract. Upon the most deliberate consideration of the subject, we

reiterate what we expressed in that case. The family relation lies at the foundation of society. Upon it rests the well being and hopes of the community. In its rights, duties and responsibilities are involved the dearest and highest interests of the state. The law, by enactment and due administration, should cherish and guard it with sacred fidelity. Otherwise, instead of being the legitimate means of individual and general happiness and prosperity, it will be perverted, and become the fruitful source of misery and ruin. It is the duty of our judicial tribunals to expound, faithfully, the enactments of the legislature, and give them due effect by legal execution. This we will do ; but in the absence of legislative provisions requiring it of us, we are not ambitious to establish for Iowa, by judicial construction, the humbling *distinction* of being "the state in which a divorce can be most easily obtained." The effect would be to make our young state the receptacle of those who are regardless of domestic and social virtue, and her laws the instrument of wrong, by depriving the innocent and unsuspecting of their rights.

We are of the opinion that the plaintiff had not acquired such a residence as is required by the Code ; that therefore the district court could not exercise jurisdiction in the case, and the complaint must be dismissed.

Decree reversed.

Smith, McKinlay and Poor, for appellant.

Clark and Bissell, for appellee.

FORD *et al.* v. JEFFERSON COUNTY.

Where defects are corrected by an amended petition, the overruling of the demurrer in reference to those defects, is waived by answering over.

An amended answer supersedes the original, and waives all objection to the demurrer affecting such original answer.

A county judge does not possess the power to settle with the treasurer and collector for the state revenue collected by him, nor to discharge him, and his securities from their liability to the state upon the bond required by the revenue law of 1847.

The cancellation of a bond by an officer not authorized, is no evidence of satisfaction.

Instructions, irrelevant to the issue, should not be given.

Appeal from Jefferson District Court.

Opinion by GREENE, J. This action was commenced by the commissioners of Jefferson county, for the use of the state of Iowa, against Anson Ford and his sureties, on his bond as treasurer and collector. The original petition was filed in February, 1852, and laid the damages at \$2000, for moneys collected by Ford, in his official capacity, from August 1849 to August 1851.

Demurrers filed to the original and first amended petition were respectively overruled and confessed, and a second amended petition was filed. To this petition, defendants demurred and answered. This demurrer was overruled, and thereupon the plaintiff demurred to defendants' answer, and the demurrer was sustained. An amended answer was filed. To this also the demurrer was sustained. Thereupon a jury was empaneled and assessed the damages at \$930,72. Motions for a new trial and in arrest

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of judgment were filed and overruled. To these proceedings several errors are assigned, which we will briefly consider.

1. The first two errors assigned, objected to the decision of the court upon the demurrers to the original and amended petitions. But as they answered the second amended petition, and as plaintiff confessed and corrected the deficient points, the defendants cannot now take advantage of that ruling. If the petitions were defective, those defects were corrected by the second amended petition. If the court ruled erroneously upon the first two demurrers, the error was waived when defendants answered over. It is conceded by all courts, that defects in form are cured by pleading over, and many courts go so far as to hold that defects, both formal and material, are thus cured. But no court could be so blinded as to decide that when substantial defects are corrected by an amended petition, answering over would not waive all objection to the ruling upon the demurrer in reference to them.

2. It is claimed, that the court erred in sustaining the demurrer to the answer, and also in sustaining the demurrer to the amended answer. The appellants are estopped from saying that the court erred in sustaining the demurrer to the answer, when they themselves virtually confessed that the demurrer was well taken by filing an amended answer. This showed an acquiescence in the ruling of the court against the sufficiency of the original answer. If they had confidence in its legal sufficiency, why did they not rest upon it? Why supersede it by an amended answer? Upon the same principle that pleading over, after a demurrer, amounts to a waiver of all objection to the overruling of the demurrer, so, the filing of an amended answer should be regarded as a waiver of all ruling in reference to the original answer. It should be considered as withdrawn. It is in effect superseded by the amended answer and should not be considered as in court. Consequently all decisions made in reference to such withdrawn or dis-

carded pleading should be considered as outside of the case and not legitimately before the court.

3. Did the court err in sustaining the demurrer to the amended answer? This question involves the law and merits of the case. The defense set up by this answer, is, that the bond upon which suit was brought was satisfied, and was cancelled by Moses Black, as county judge of Jefferson county, on the 19th September, 1851. The demurrer admits the cancellation as alleged, but denies the authority of the county judge to make such settlement and cancellation, so far as the rights of the state are concerned, and claims that no act of the said judge could impair the rights of the state to recover.

The answer confesses the allegations of the petition, but seeks to avoid them by introducing the new matter of settlement and cancellation. The demurrer admits the settlement and cancellation, but denies their legal validity and the authority under which they were made. This brings the controversy down to a naked proposition of law. The power of the county judge to close a settlement with the treasurer and collector for the revenue collected by him for the state. The court below decided against this power, in sustaining the demurrer.

In August, 1849, when Ford came into office as treasurer and collector, the revenue act of February 2, 1847, was in force. This act provides that, "the county recorder of each county shall be *ex officio*, the treasurer of the county and shall qualify as hereinafter provided." The qualification is thus prescribed. That he shall file with the clerk of the district court, a bond payable to the county commissioners, &c., conditioned for a faithful discharge of his duties according to law, and for the payment of all moneys coming to his hands as treasurer, which bond shall operate as, and have the effect of a judgment confessed, until a final settlement with the board of county commissioners and auditor of state." Laws of 1847, 141.

This act also declares; "that on or before the 15th day

of February, of each year, the treasurer shall pay into the state treasury the amount of money collected by him, and that he shall collect the delinquent taxes of the preceding year, and shall pay the same over in like manner, and also that he shall be charged with the amount of state tax according to the copy of the assessment list returned to the auditor of state, and *shall only be released from the obligation of his bond when the whole amount shall have been paid in, or satisfactorily accounted for.*"

As this case turns entirely upon the construction given to the statute, we have quoted largely from it. The requirements are so explicit, and the duties and liabilities of the treasurer and collector, are made so apparent, that comment would hardly seem necessary. The statute and conditions of the bond are not satisfied by a final settlement with the county commissioners alone. There must also be a settlement with the auditor of state. There must not only be a full and final settlement with both of those officers, before the obligors are released from the bond, but it must also appear that the whole amount of state tax had been paid in, or satisfactorily accounted for. To whom is this payment or satisfactory account to be rendered so far as the state revenue is concerned? The statute explicitly answers, to the "auditor of state." It would be as reasonable to say that a city officer, or a private individual is authorized to secure such payment for the state, as to say that the board of county commissioners or the county judge is thus authorized.

The county judge derives his powers entirely from the Code. But the Code confers no authority upon that officer to receive money or make settlements for the state. He is empowered to audit and settle accounts connected with the revenue of his county. Beyond his county he cannot go. He has no more right to act for the state of Iowa than for any other state of the Union. In a word, he can exercise no other powers than those expressly conferred by statute. The jurisdiction of a county court is special

and limited. It is confined to the usual powers of a judge of probate and county commissioners, and those powers are specifically defined by law. Code, § § 103 to 149.

It would be a monstrous stride in extra judicial assumption, to say that a county judge can be justified in acting as auditor and treasurer of state.

We conclude then, that the county judge did not possess the power to settle with the treasurer and collector for the state revenue collected by him, nor to discharge him and his securities from their liability on the bond. It therefore follows, that the court below did not err in sustaining the demurrer to defendants' answer.

4. The remaining errors assigned are disposed of by the decision upon the last point. But as counsel for appellants attach great importance to the instructions asked by them and which were refused by the court below, it may be well to give them a brief notice. The two instructions referred to, are in reference to the cancellation of the bond, and assume that such cancellation by the county judge, amounts to *prima facie*, or at least presumptive evidence of satisfaction. The court very properly refused these instructions for two reasons:

1. Because the cancellation of a bond by an officer or person not authorized by law to do so, is no evidence of satisfaction. Any further discussion of this self evident proposition seems superfluous.

2. Because the court should refuse to give instructions which are irrelevant to the issue, ^(a) The only matter submitted to the jury was the assessment of damages upon the bond. All other questions in the case had been fully determined by the pleadings, and the decision upon the demurrer to the amended answer. The legal effect of the cancellation had been fully determined by the court, and was in no way subject to the action of the jury.

As the amount of the damages, was the only question of fact in dispute, and as the instructions asked, had not

(a) *Packer v. Cockayne*, 3 G. Greene, 111; *Tryon v. Ouley*, ib., 289.

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the slightest application to that question, they were very promptly refused.

Judgment affirmed.

Wright, Slagle and Acheson, for appellants.

Wm. Penn Clarke and Charles Negus, for appellee.

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THE STATE v. LIGHTON *et al.*

In a joint prosecution against two persons for uttering counterfeit money, separate bail was given by defendants; a default was entered against them, and a *scire facias* issued against them and their sureties in the recognizance; held that the court erred in rejecting part of the record entries offered by the state, to show that the defendants were in default, and had forfeited the conditions of the bail bonds; held also that the record in such a proceeding is an entirety; that the proceeding is joint and several, and the taking of separate bail, would not, under the joint record, be inadmissible.

A petition is not necessary for a *scire facias*, when the record of the case and the *scire facias* are in the same court.

Appeal from Wapello District Court.

Opinion by HALL, J. Isaac Burton and John Gable were arrested on a warrant issued by James Baker, a justice of the peace for Wapello county, charged by the complainant, John Bowrievu, with the crime of passing counterfeit money. The complaint was made on the 13th of October, and an examination was had on the 14th of October, 1852. The evidence was all reduced to writing. The justice decided that the offense charged had been committed, and that there was sufficient cause to believe that the defendants were guilty, and he accordingly rendered the indorsement required by the Code, § 2872, and in the

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form there prescribed. The defendants then severally gave bail; Lighton and Given becoming bail for Burton, by which they acknowledged themselves indebted to the state of Iowa in the sum of \$200, condition that Burton should appear at the next term of the district court for Wapello county on the first day of the term, and not depart without leave, and abide the judgment of the court, and answer to the charge of uttering counterfeit money.

Gable gave similar bail. The justice returned all the papers and proceedings to the district court.

At the April term of the court, 1853, it being the next term after the examination, the grand jury of Wapello county, returned a true bill of indictment against Gable and Burton for uttering counterfeit money. Thereupon the defendants were called, and not appearing to answer the indictment, a default was entered against them, and a *scire facias* ordered against the bail. The record entry made by the court, in defaulting the defendants, entitles the case; "*The State of Iowa v. Isaac Burton and John Gable*," following the indictment. At the August term, 1853, a *scire facias* was issued against the defendants and their bail, and served on Lighton and Given. After an amendment, issue is taken upon the allegations, in which they deny that any indictment was found, or any default entered by the court, &c.

On the trial, the prosecuting attorney introduced, on behalf the state, the entire proceeding had before the justice, as returned to the district court; the indictment found by the grand jury, and then offered the record of the district court, as appears in the journal entries; also the entry and act of the court, showing that the defendant had made default and forfeited his undertaking on the bail bond.

To this, the defendants objected, and the objection was sustained, and the court refused to admit the record in evidence, to show that the bail was forfeited. To which

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ruling, the plaintiff objected, and assigns for error this ruling of the court.

It is difficult to see upon what grounds the court below excluded this portion of the record. As a matter of convenience, probably, the prosecuting attorney, on the trial below, offered this record in evidence in parcels; first, the proceedings returned by the justice; second, the indictment; third, the journal entry; and hence the court let some parts go in evidence, and excluded other parts. But the record is an entirety. For the purpose of this trial it was all good or all bad. It must be taken as a whole, and if, when construed together, it fixed a cause of action, and proved the allegations in the *scire facias*, a judgment should have been rendered for the plaintiff. No other defense could be made to this record than to any other judicial proceeding that appears of record. The answer is substantially *nul tiel record*, and all the court could do was to decide whether there was such a record or not.

It would seem that the court below entertained the opinion, that inasmuch as the defendants, Burton and Gable, separated in giving their bail, and entered into separate undertakings, that the record should have shown a separate and distinct forfeiture against each defendant, and that inasmuch as the record offered in evidence shows that they were both called at the same time, and treated as joint defendants, that it did not meet the averment in the *scire facias*, that the defendant, Burton, was called. This view is certainly not correct. With few exceptions, when two or more are charged with a public offense, the charge is necessarily joint and several. In all cases where the offense can be committed by one person, this is the case. The offense charged against Gable and Burton was joint and several; one or both could be convicted. The entire prosecution, with the mere exception of taking bail, has been joint and several against them. They stood together in court, and the bail was given with reference to a joint and several prosecution against them, and it is impossible

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to conceive how the securities could be prejudiced in any degree by the form adopted by the court in recording the fact that both defendants, in the place of one, had failed to appear and answer the charge, as they were bound to do. How the fact was less true that Burton made default, because in the same entry it shows that his co-defendant also made default, is certainly strange.

The counsel for the defense, in his argument, attempted to avoid the direct error of the court by assuming:

1. That there being no petition filed, there was no suit pending.

2. That there was a variance between the *scire facias* and the recognizance offered in evidence.

3. That the undertaking of the bail is void. 1. Because it does not show that the justice had jurisdiction. 2. That it does not show that there was probable cause, and that the offense charged had been committed; that the defendants were required to give bail; that the bail was properly acknowledged, &c.

To this argument we reply:

1. That no petition is required. The record upon which the *scire facias* is based, remaining in the same court with the *scire facias*, constitutes the petition.

2. That the proceedings returned by the magistrate to the district court, show substantially all these facts, and the bail is but a part of them. The Code does not contemplate that everything shall be recited in the undertaking of bail.

Judgment reversed.

J. C. Knapp, for the State.

Wm. Penn Clarke, for appellees.

Smith v. Snodgrass.

SMITH v. SNODGRASS.

Where a justice of the peace sent up to the district court an amended transcript, on discovering an omission in the one first sent up, and within the time required for the returning of the transcript in appeal cases, it is error in the district court to reject such amended transcript.

Appeal from Polk District Court.

Opinion by GREENE, J. This suit was commenced before a justice of the peace by E. Smith against W. and A. Snodgrass. Plaintiff recovered judgment, and defendants appealed to the district court. It appears that before the justice the defendants filed a set-off, which was orally denied by plaintiff, but this fact not appearing in the original transcript, filed by the justice, he subsequently and within the time directed for returning the transcript, filed an amended transcript, showing plaintiff's reply and denial of defendants' set-off. This amended transcript was ruled out by the district court, and judgment was rendered in favor of defendants.

Among the objections urged to this proceeding, the only one to be considered is, did the court err in rejecting the amended transcript? Where a justice in the first instance neglects to make a full return, he clearly is authorized to correct or perfect such return, by sending up an additional or more complete transcript. This he may do when the omission is discovered, or upon rule from the district court to perfect his return.

The amended transcript in this case was important. It showed that the items of plaintiff's set-off had been denied before the justice. But from the instructions to the jury in the district court, we infer that they were taken as true without proof, because the defective transcript before the court, did not show that they had been denied before

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the justice. We are of the opinion, therefore, that the court erred in excluding the amended transcript.

Judgment reversed.

C. Bates and D. O. Finch, for appellants.

J. E. Jewett, for appellee.

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REYNOLDS *et al* v. MAY *et al*.

A suit commenced by attachment against "the heirs of Otis Reynolds," does not sufficiently designate the defendants, under the Code, § 1634.

An action should not, at first, be instituted against the heirs of an estate, for the collection of a debt. The estate should be administered agreeable to the Code, Chap. 83.

The heirs of an estate can only be rendered liable where an indebtedness is established against an executor, and the assets in his hands prove insufficient, and where the heirs have had a portion of the estate set apart to them.

Appeal from Lee District Court.

Opinion by HALL, J. On the 19th of April, 1853, May & Andre filed their petition against "the heirs of Otis Reynolds." The petition sets out a demand based upon a bill of exchange, dated at Pittsburgh, April 28th, 1837, drawn by Otis Reynolds on J. & E. Walch & Co., of St. Louis, in favor of plaintiff, for the sum of five hundred dollars, payable six months after date, and directs Walch & Co. to place the same to the account of steamboat Rolla; that the bill had been presented to J. & E. Walch for payment, and by them refused; there is no averment of notice of non-payment to Reynolds, nor excuse for not giving notice; that prior to 1841 Reynolds died, holding and claiming certain real estate in Lee county, being an interest in the half-

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breed Sac and Fox reservation; that in a subsequent proceeding in partition of said tract, eleven-twelfths of a share was set off in said tract to his heirs, which they still hold by inheritance; that the petitioner does not know the precise names of the heirs; that they are non-residents of the state of Iowa. The petition is sworn to by D. F. Miller, one of the counsel for plaintiff, and an attachment issued and levied upon real estate appraised at about \$1400 00. A notice is issued against the "*heirs of Otis Reynolds,*" and returned, "not found." A publication is made against "*the unknown heirs of Otis Reynolds.*" D. F. Miller files an affidavit, stating "that as he is informed and believes the place of residence of said defendants is unknown to said plaintiffs, and that though he has made all the efforts within his ability to ascertain the actual residence of said defendants, he has not succeeded in doing so, and has not therefore been enabled, since the commencement of this suit, to send a copy of the notice of suit, and of the petition of plaintiff to said defendant."

At the November term, 1853, a default was entered; and damages assessed by the clerk, and judgment rendered for \$962 against the defendants, and an order that the land attached be sold to satisfy this judgment.

Hiram Reynolds and other heirs of Otis Reynolds bring this case up by appeal, and assign for error:

1. The want of jurisdiction in the court below; that the defendants could not be brought into court by the designation of "heirs;" that no judgment could be rendered against them as heirs; that the notice was not sufficient to make them parties.

2. The petition shows no cause of action against defendants.

This cause certainly presents some peculiar features. On the 25th day of April, 1837, Otis Reynolds drew a bill of exchange in favor of May & Andre, on J. & E. Walch, directing them to charge the amount against the steamboat Rolla. Reynolds died before the year 1841.

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The matter rested sixteen years after the bill was drawn, and thirteen years or more after the death of Reynolds—there never having been any notice served on Reynolds of the dishonor and non-payment by Walch—when this suit is brought in the state of Iowa, and an attachment issued against the heirs.

There is probably not a state in the union, where this debt, if just, would not be barred by the statute of limitations, or where the estate of Reynolds would not have been settled at least ten years. There is something extraordinary in this delay, as well as the manner of bringing the suit.

Section 1694 of the Code provides that “when the precise name of any defendant cannot be ascertained, he may be described as accurately *as* practicable, and when the name is ascertained, it shall be substituted in the proceedings.” Under this section it is claimed that the suit is properly brought against “*the heirs of Otis Reynolds.*” Now what is it that is not known? 1. That Otis Reynolds had any heirs. 2. What relation his heirs bore to him if he had any. 3. Whether they bore his name or some other name. 4th. Whether they were males or females, infants or adults, sane or insane; whether there is one or one hundred. Surely it was not the want of a knowledge of the “*precise name,*” but it was unlimited ignorance of there being even any body to name or any body to describe. The Code contemplates that the defendant shall be a known person, who can be described with some certainty. That some indefinite knowledge shall exist as to the name, and it is only that which fall short of precision that can be supplied by a description of the person.

The Code certainly does not authorize the bringing of a suit in this way, by describing defendants by a class name, without reference to their number or condition. Such a description of a person is no description whatever. It gives no guide by which the officer can be governed in making service. The suit might as well have been

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brought against a "Yankee," a "Hoosier," or a "Buck-eye."

The suit is improperly brought against the heirs, even if they had been named. The Code, chapter 83, furnishes a complete remedy in these cases. The estate must be administered upon; the amount liquidated by a judgment against the executor. Then the creditor can proceed by petition against the land, and have it sold. The land can also be sold on the petition of the executor.

But the law certainly does not authorize, in the first instance, a direct process and suit, and personal judgment against the heirs.

When the debt is established against the executor, and the estate in his hands proves insufficient to pay, and the heirs have received a part of the estate, they can be called upon to surrender up a sufficient amount to pay the demand. This is the *ultimatum* of their liability. To allow direct proceedings against them, without any reference to the executor for the debts of the ancestor, would certainly be novel and subversive of the whole policy of the law in settling decedent's estates.

There are several other questions presented in the record, which are not noticed, as the point decided goes to the very foundation of the suit, and declares the whole proceeding to be *coram non judice* and void, on the ground that the petition shows no cause of action and has no defendant or party against whom suit can be brought or a judgment rendered. The judgment will therefore be reversed and the proceedings dismissed.

Judgment reversed.

Reeves and Miller, for appellant.

Love and O'Conner, for appellees.

WILLIAMS v. GARTRELL et al.

An assignment, under the Code, is not valid unless made for the benefit of all the creditors. The assent of creditors to a conditional assignment will not be presumed.

The Code will not justify a construction by which one class of creditors will be preferred over another; nor will it justify a partial and conditional assignment.

Where an execution sale was postponed at the request of the defendant, in consequence of which the property levied upon, materially depreciated in value; held, that the loss resulting from such postponement should not be sustained by the plaintiff.

A levy upon personal property to a sufficient amount to satisfy the debt, is not of itself satisfaction; not so at least, as between the parties to the execution, although it may be so regarded as to third parties.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This suit was instituted to set aside an assignment made by H. C. Gartrell, to Ben. M. Samuels, and for judgment against Samuels as garnishee.

It appears that Gartrell confessed judgment in favor of Williams for the sum of \$2,600 00 at the January term of the Dubuque district court. In February an execution was issued by which \$2026 of the judgment was satisfied, and in May following, an alias execution was issued to make the balance due on the judgment. This alias was levied upon the rights of Gartrell in the hands of Samuels, who was summoned to answer as garnishee.

Samuels answered that the goods and credits in his hands belonging to Gartrell, had been assigned to him on the 9th of February, 1852, in trust, for the payment of his debts, with certain conditions and qualifications.

On the trial, it appeared that goods sufficient to satisfy the judgment were levied upon by the first execution, but the sale was postponed by order of the plaintiff, at the special request of Gartrell, and it is contended that in consequence of such delay, the goods first levied upon, deprecia-

ted in value, and therefore did not sell for enough to satisfy the execution.

Upon these facts, the district court decided that the assignment from Gartrell to Samuels is fraudulent in law, and void as to those creditors who had not accepted; but to those who had accepted, it is good. The court also decided that the first execution and levy having been made upon sufficient property to satisfy the judgment, and a loss having resulted from the postponement, that loss must be sustained by the plaintiff; and the fact that the execution defendant requested the postponement, does not vary the question. To these decisions both parties except.

1. The appellees claim that the court erred in pronouncing the deed of assignment as to creditors who had not accepted, void. It contains the following clause. "It is hereby understood, and this assignment is on this condition, that in consideration of my assigning, &c., my said creditors do give unto me a written release of all indebtedness to them, and do accept the benefit of this assignment in full satisfaction," &c.

The Code, § 978, provides, that in the case of an unconditional assignment, the assent of creditors shall be presumed. But the assignment in this case is not unconditional, and therefore such assent cannot be presumed. No assignment under the Code, § 977, can be valid, unless made for the benefit of, the creditors of the assigning debtor. If, then, the conditions of the assignment had not been complied with by the creditors—if all had not given a written release of indebtedness, it could not be applied for the benefit of all, and hence it would be partial, if declared valid as to some, and void as to other creditors. The Code will not justify a construction by which one class of creditors would be preferred over another, nor will it justify a partial and conditional assignment. It is true in many of the states an embarrassed debtor may assign his property for the benefit of preferred creditors. But fortunately for justice and impartiality to creditors, this question is in Iowa *res integra*,

and as the Code contemplates an absolute and unconditional surrender of the property assigned for the benefit of all the creditors, we think no assignment should be considered valid when it contains any reservation or condition for the benefit of the assignor ; such as requiring an absolute discharge, upon condition of part payment or a partial distribution.

We conclude then, that the court below erred in not declaring the deed of assignment absolutely void as to the creditors.

2. We think the court erred again in deciding that the loss of value in the property levied upon, in consequence of the postponement of the sheriff's sale, must be sustained by the plaintiff, although the postponement was at the request of the defendant. In the first place, it is not true that a mere levy even if made upon sufficient property, will, as a general rule amount to satisfaction. It is only considered satisfaction in certain cases, as where the rights of junior execution creditors intervene, or where the delay of sale was occasioned by the plaintiff himself, without the agency or consent of the defendant. But here the delay was occasioned by the defendant himself and at his especial request ; and now he alone and no junior execution creditors complain of the loss occasioned by the delay.

It may well be held that as respects third persons, a levy on personal property is satisfaction, but not so as between plaintiff and defendant. *Duncan v. Harris*, 17 Seig., and R; *Greene v. Burk*, 23 Wend., 490.

Upon this point, the authorities, and particularly those of New York, are quite conflicting. But the inconsiderate position assumed in 4 Cowen, 417, that a levy on personal property to a sufficient amount to satisfy the debt, operates *per se* as an extinguishment, is virtually overruled in more recent and better considered opinions. It is now conceded in that state, that a levy is not *per se*, a satisfaction and cannot be if the levy fail to produce satisfaction in fact

Crick v. McClintic.

without any fault of the plaintiff. Goods are seized to secure payment, not as payment. They are levied to obtain satisfaction, *sub modo*, and not as satisfaction absolute.

Judgment reversed.

L. Clark and F. E. Bissell, for appellant.

B. M. Samuels, for appellee.

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CRICK v. MCCLINTIC.

Where the defendant took exceptions to a deposition, which had been taken by plaintiff, but before the question was decided waived his exception and offered to read the deposition in his own behalf; held, that the court erred in rejecting the deposition.

A deposition, properly taken, may be used on the trial in the same manner as the testimony of a witness.

Appeal from Jefferson District Court.

Opinion by HALL, J. McClintic sued Crick, in the court below for slander; charge of theft. The plaintiff took the deposition of one Long, to which defendant below excepted, and submitted his exceptions to the court. Before the court decided the exceptions, or made any ruling upon the question, the plaintiff closed his evidence and the defendant was submitting his evidence to the jury, when the defendant offered to read the deposition in his behalf; the defendant waived, and the plaintiff submitted to the exception simultaneously. The court refused to let the defendant read the deposition; the defendant excepted, and assigns that ruling for error.

Depositions, when properly taken, take the place of the witness in court, and can be used by either party in like

Keitler v. The State.

manner. Section 2464 of the Code, provides that "all motions to exclude depositions must be made before the commencement of the trial, or objections to their introduction will be deemed waived." The plaintiff below, took no exceptions to the depositions excluded by the court. The defendant waived those which he had interposed; there was, then, no objection whatever to it. It took the place of the witness, and the court could as well exclude the evidence of a witness without objection as a deposition.

Judgment reversed.

Charles Negus, for appellant.

Slagle and Acheson, for appellee.

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KEITLER *et al.* v. THE STATE.

The Code confers no authority upon the prosecutor to challenge the pannel or individual members of the grand jury. And as the district court has not the power to select or create, neither has it the power to remove or reform the members of the grand jury.

The policy of the Code is to keep the grand jury independent of control and influence from the district court.

Where a power is not expressly conferred, nor necessarily inherent in the court, it cannot be assumed under an inference of law.

The right to challenge either the pannel or a member of the grand jury, is limited to the defendant.

Error to Lee District Court.

Opinion by GREENE, J. Indictment against Keitler and others, for an assault and battery with intent to commit bodily injury. A motion was made to set aside the indictment, on the ground that it was not found by a grand jury legally constituted. Motion overruled. This ruling

assumes that the grand jury was legally constituted at the time the indictment was found.

It appears, at the September term, 1853, of the Lee district court, after the grand jurors had been duly sworn and had made considerable progress in the business of the term, that an affidavit was filed, alleging that four of the jurors were implicated in an offense, and thereupon, the court was requested to remove them and appoint others in their place. The change was made, and thereupon the indictment in the present case was found.

The selection and impanneling of grand jurors are matters of statutory regulation. The Code confers no authority upon the prosecutor to challenge the pannel or individual members of the grand jury, and as the court has not the power to select or create, neither has it the power as an incident to jurisdiction, to remove, reform or change the members of the jury. If by virtue of this incident to jurisdiction, the court has the discretionary power to reform the jury for one purpose, it may for another, and if four, then, may more or all the jurors be changed, and thus the obvious policy of the law to constitute and preserve that body, independent of control and influence from the court, would be thwarted. Although the jurisdiction of the grand jury is co-extensive with that of the court, for which they are to inquire, both as to extent of territory and the offenses to be investigated, and although they are sworn and charged by the court, still in their presentments they should act as a distinct and separate body, free from any fear, favor or affection, resulting from the court or any other influence. If the court had the power to create, or change them at pleasure, or upon a *ex parte* affidavit, they might soon become the subjects of fear and favor, or of prejudice and popular caprice; the wholesome safeguards of the law for their selection rendered abortive, and the stability and independence of the pannel greatly impaired.

This tribunal is invested with no ordinary powers. Their

power to accuse a citizen of any offense without his presence and without evidence in his favor—their power to cast upon a citizen the odium of an indictment for a criminal offense, shows the importance of enforcing those prudential regulations which the law requires in their selection. This matter is so jealously guarded by our Code, that the selection is not left to any one officer of the county, but several are required to act in conjunction. Code, § § 1633,–1641.

It is conceded that the Code gives no express authority to the court to reform the grand jury, but the court below appears to have inferred this power from § 2891, of the Code, which provides that “from the persons summoned to serve as grand jurors, the court must appoint a foreman. The court shall also appoint a foreman, when the person already appointed is discharged or excused before the grand jury is dismissed. In *Norris House v. The State*,^(a) it was held by this court that the discharge or excuse of the foreman which would justify the court in appointing another foreman, has reference only to his discharge or excuse as foreman and not as a grand juror. If discharged or excused from the pannel, the court is not authorized by this section to appoint another foreman from bystanders. He is still confined in his appointment to the persons summoned to serve as grand jurors. We cannot discriminate from what portion of the § 2891, or from what portion of the Code, authority can be inferred to the court to thus change and reform the grand jury. Surely, such authority cannot be inferred from the power to appoint or re appoint a foreman from the grand jurors summoned.

It is not usual in any state, for courts to have the authority to appoint or change the pannel of grand jurors, and before this extraordinary power is exercised, it should be justified by something more than mere inference. When a power is not expressly conferred, nor necessarily inherent in the court, it cannot be justified by an inference of law.

(a) 3 G. Greene, 513.

Roop v. Clark.

Under the Code, the state or prosecutor, has no right to challenge either the pannel or a member of the grand jury. This right is given only to a "defendant held to answer for a public offence." §2882. While the Code expressly confers the right of challenge upon the defendant, it is entirely silent as to the state or private prosecutor, and hence it must be inferred that the object of the law was to limit this right exclusively to defendants.

Judgment reversed.

J. M. Love and H. O'Connor, for plaintiff in error.

D. C. Cloud, for the State.

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ROOP v. CLARK, *Guardian, &c.*

The effect of a plea of abatement is abolished by the Code, and courts are authorized to have proper parties substituted without abating the suit.

The attestation of a record may be according to the form used in the state from which the record came.

Letters of guardianship from a probate court of Ohio, admitted as good, when the probate judge certifies that by law, he is his own clerk, and that the certificate is in due form.

Appeal from Mahaska District Court.

Opinion by HALL, J. Wm. Seaton, brought suit in the district court, against Roop, as a surviving partner, on a demand arising on promissory notes. After the defendant below had filed his answer to the merits, further answers and states that Seaton, the plaintiff, was insane and had a guardian, but does not name who was his guardian. The plaintiff admits the facts, and asserts that Alexander Clark is the guardian, and produced letters of guardianship certified

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to by clerk of the probate court of Carrol county, state of Ohio. The appointment of guardian appears to have been made by the court of common pleas. The probate judge certifies that by law he is his own clerk, and that the certificate is in due form and attaches his seal to both certificates. Upon this the court allow Clark to be substituted as plaintiff in the suit, and the cause progressed in the name of Clark as guardian. To this, the defendant excepts and assigns the ruling of the court in substituting Clark as defendant, as error.

The effect of a plea of abatement is abrogated by the Code, as the law now stands. When an objection is made to the capacity of the plaintiff to bring the suit, the court will ascertain the fact, and allow the name of the proper party to be substituted, and the suit progresses. This has been done in this case, but the objection is, that the copy of the appointment of Clark as a guardian, was not authenticated in such a manner, that it could be named in evidence by the court, and consequently the substitution was improper.

1. Greenl. Ev., § 506 ; says, "that the attestation of the copy must be according to the form used in the state from which the record comes, and must be certified to be so by the presiding judge of the same court." "And if the court itself is extinct but its records and jurisdiction have been transferred by law to another court, it seems that the clerk and presiding judge of the latter tribunal are competent to make the requisite attestations."

This authority answers the entire objection. See also *Gay v. Lloyd*, 1 G. Greene, 78 ; *Young v. Thayer*, ib., 196.

Judgment affirmed.

E. W. Eastman, for appellant.

J. C. Knapp, for appellee.

Reeves & Co. v. Jones.

REEVES & Co. v. JONES.

Where B. testified, on garnishee process, that he executed a note to the defendant, but did not know whether he still held the note or not; and where defendant testified that he held the note, but claimed that the money belonged to his wife, and that he only acted as her agent; held that as the money was controlled by the husband, without notice of the wife's ownership, and as the note had not been negotiated, judgment should have been rendered against B. as garnishee.

Appeal from Lee District Court.

Opinion by GREENE, J. Jesse Reeves & Co., sued L. Jones before a justice of the peace, for damages to a horse. Plaintiffs recovered a judgment for ninety dollars, and to secure the amount they garnisheed H. H. Belding, who on his answer stated that he had executed a note to the defendant or \$106, of which there was about \$90 due, and that he did not know whether defendant "still held the note or not." Plaintiffs then called upon the defendant to testify in relation to the garnishment, and thereupon Jones said he held the note, but that the money loaned to Belding, was the money of his wife, that it was due her before their marriage, that she had received it a short time ago from a man in Ohio, for the purpose of buying a piano, and that he only acted as her agent in loaning the money to Belding. The justice thereupon rendered judgment against the garnishee.

The case was taken to the district court by writ of error, and then the judgment against the defendant was affirmed, but was reversed as to garnishee.

The only question to be decided is, did the court err in reversing the judgment against Belding, the garnishee. It appears that Belding executed the note to Jones, and was indebted to him alone. He or his indorsee only could maintain an action upon the note. Mrs. Jones was not known in the transaction. Belding received the money of Jones, and made the note to him without any notice of her

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interest. As she left the money under the control of her husband, it was vested in him in favor of third persons acting in good faith and without notice of her ownership. Code, § § 1445, 1453.

We think, therefore, that the judgment against Belding should have been affirmed by the court below.

Judgment reversed.

Reeves and Miller, for appellants.

Geo. C. Dixon, for appellee.

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DEAKE v. ACHISON.

Any defect, or want of notice before a justice of the peace, is waived by appearance, and by going to trial in the district court.

Appeal from Appanoose District Court.

Opinion by HALL, J. Drake sued out an attachment before Adam Hopkins, a justice of the peace, against Achison, and John Hicks was notified as garnishee. On the return of the attachment, a motion was made by defendant's agent for a non-suit, which was overruled by the justice; after which, a trial was had and judgment rendered against defendant for \$35. The notice was returned, "not served on defendant." From this judgment, Achison appealed to the district court, and filed his appeal bond, and notified the plaintiff of the appeal.

In the district court, the parties appeared and had a trial by jury, and verdict was returned by the jury in favor of plaintiff for thirty-five dollars. After the verdict and before

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judgment, a motion was made by defendant to dismiss the suit, on the ground that the court had no jurisdiction of the case. That there had been no notice served on the defendant before [the justice ; that the person who appeared there as agent, had no authority to appear, that defendant had never been in court. These cases were sustained by affidavits.

The court below sustained the motion and dismissed the suit. The plaintiff now assigns for error this dismissal by the court below.

The appearance of the defendant in the district court, and proceeding to trial on the merits without objection, cured every conceivable objection to the jurisdiction of the court over the person of the defendant. The justice had jurisdiction over the subject matter and the process, and the defendant voluntarily subjected himself to the jurisdiction of the district court, and if he ever had any cause to complain, he comes too late after the verdict of the jury against him. The clear duty of the court was to have rendered a judgment for the plaintiff upon the verdict. The cause will, therefore, be reversed and remanded to the district court of Appanoose county, which is directed to render a judgment for the plaintiff upon the verdict of the jury as rendered.

Judgment reversed.

S. W. Summers, for appellant.

D. P. Palmer, for appellee.

Viele v. Blanchard.

VIELE v. BLANCHARD.

Where the record of a decree shows an absolute discharge in bankruptcy, and also shows that the bankrupt was authorized to receive a certificate, it is sufficient evidence of discharge in bankruptcy, without the certificate.

Where the record shows jurisdiction in a proceeding of bankruptcy, the decree is conclusive evidence of the discharge without pleading the certificate.

Appeal from Muscatine District Court.

Opinion by GREENE, J. Leonard Blanchard commenced this suit against William D. Viele, on a judgment obtained against him in New York, in 1840. Defendant pleaded his discharge from this debt by virtue of a decree under the general bankrupt law. Plaintiff demurred to this answer, on the ground that it does not plead the *certificate* of discharge, nor set out a copy. The demurrer was sustained and judgment was rendered against the defendant.

The demurrer should have been overruled. The answer regularly pleads the proceeding in bankruptcy, by which it appears that on the 3rd day of April, 1842, "it was ordered and decreed by the court that the said William D. Viele is entitled to a full discharge of all his debts, pecuniary contracts, and engagements provable under the said act, and the same is hereby decreed and allowed; and it is further ordered that a certificate thereof be granted to him."

The decree not only shows an absolute discharge in bankruptcy, but it also shows that the bankrupt was authorized to receive a certificate.

True, the fourth section of the General bankrupt law, provides that such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge, but the decree in this case, shows that the "discharge and certificate were duly granted." By

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this section, the discharge and certificate alone may be pleaded in bar; *White v. Howe*, 3 McLean, 291; but it does not therefore follow that the entire proceedings and decree in bankruptcy, may not be pleaded with equal effect and conclusiveness. The discharge and certificate, are merely evidence of the proceedings and decree, but clearly the proceedings and decree are equally as good evidence of themselves. They establish the *discharge*, and the fact that the *certificate* was granted. Where the proceedings show jurisdiction, as in this case, the decree is conclusive of the discharge, and therefore the certificate is not important when the proceedings and decree are pleaded. *Magoon v. Warfield*, 3 G. Greene, 293.

Judgment reversed.

S. Whicher, for appellant.

Cloud and O'Connor, and *W. Penn Clarke*, for appellee. !

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BRADLEY v. JEFFERSON COUNTY.

A county collector and treasurer is authorized by the Code, to employ a deputy, and it is the duty of county court to make reasonable allowance for the services. If the salary is not stipulated before the services are performed, reasonable compensation to be determined by law and evidence, must be made after the services are rendered.

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Appeal from Jefferson District Court.

Opinion by HALL, J. Bradley was collector and treasurer of Jefferson county. During the time he held the office it became absolutely necessary, for a proper discharge of the duties of his office, owing to the pressure of business, that he should employ a deputy to assist in the office.

This he did, and paid him a fair and reasonable compensation for his services.

For the amount so paid by him, he presented a demand to the county court, who refused to allow it. An appeal was taken to the district court, and the district court decided that he should not be paid, and rendered judgment against him, from which decision the appeal is taken to this court.

Section 417 of the Code contemplates precisely such a case as this, and provides "that the county court may make a reasonable allowance to the deputy." The court below probably construed this section so as leave the question of payment discretionary with the county court. In this we think it erred. The Code contemplates that the county court may make the allowance at the time, or prior to the appointment of the deputy; in other words, that the county court may specify a reasonable compensation for the deputy before he renders the services, in the form of a stipulated salary. If it is not fixed in this manner, and the services are rendered, then the county must pay a reasonable compensation for the necessary services rendered; and this amount was not left to the capricious notions of *a man*, but to the sound discretion of *a court*, which should be controlled by law and evidence.

Judgment reversed.

C. Negus, for appellant.

Knapp and Clinton, for appellee.

FURGISON *et al.* v. THE STATE.

In an action upon a bail bond, when a copy of the bond is annexed to, and thus becomes a part of the petition, such facts as are established by the bond, need not be averred in the petition.

Presumptions of law need not be averred or proved.

By making a bail bond, the obligors admit the facts and circumstances which rendered the bond necessary, and it will be presumed that these facts gave the officer jurisdiction to take the bond.

Appeal from Johnson District Court.

Opinion by GREENE, J. This proceeding was commenced on the relation of John Parrott, as school fund commissioner of Johnson county, against Alfred Furgison and John M. Bay, on a recognizance bond for the non-appearance of said Furgison to the charge of larceny. A petition for *scire facias* was filed under the Code. The petition shows that, October 27th, 1852, said Bay and Furgison executed a bond in the penal sum of \$350 00, for the appearance of Furgison at the next term of the district court to answer the charge of larceny. March 23, 1853, an indictment was found in due form, against Furgison, for the offense. Furgison failed to appear at the March term, 1853, agreeable to the conditions of the bond, and it was thereupon ordered by the court that the recognizance be forfeited, by reason of which the relator claimed the penal sum therein named for the school fund of the state. These facts are set forth in the petition, with sufficient detail and clearness.

To this petition, Bay demurred, on the ground that the petition does not aver that the bond was accepted by a competent officer, that Furgison was not admitted to bail or discharged from actual custody on taking bail by a competent court; that the magistrate did not certify his decision, and that said bail was not justified by affidavit. The

demurrer was overruled, and this decision is assigned for error.

We think the court ruled correctly. True, the matters referred to in the causes of demurrer, are not specifically averred in the petition, but so far as they are material, they are established by the bond itself, which is made a part of the petition. The petition and bond sufficiently show the admission and taking of bail. It is not necessary that the petition should aver that the magistrate certified his decision, or that the bail justified by affidavit. These are presumptions of law, and therefore need not be averred or proved. The bond itself shows that it was taken by an officer who could admit to bail in allailable cases. Code, § 3216, and that it was a case in which bail might legally be taken.

The petition shows a substantial cause of action. It states all the material facts necessary to enable the state to recover upon the bond. The execution of the bond and the failure to perform its conditions, create the liability of defendants. By making the bond, they admit the facts and circumstances which rendered the bond necessary. It is not at any rate necessary to aver those facts and circumstances in order to sustain an action upon the bond. It will be presumed that the facts in the case, gave the officer jurisdiction to take the bond.

In New York, it has been repeatedly decided that a declaration upon such a recognizance or bond need not aver the existence of the particular facts, which prove that the officer had authority to take it. *The People v. Kane*, 4 Denio, 530, 544; *The People v. Mills*, 5 Barb., 511; *Champlain v. The People*, 2 Comstock, 82.

Judgment affirmed.

J. D. Templin, for appellant.

D. C. C. loud, for the State.

BOON v. ORR.

In an action of trespass before a justice of the peace, a petition was filed, and during the trial was mislaid, but was subsequently found, and on appeal to the district court was sent up with the transcript; held that the petition need not be copied into the docket, and that as the *petition* and docket together, showed a cause of action, the case should not be dismissed.

Rails, laid into a fence, are a part of the freehold, and belong to the owner of the soil.

Appeal from Keokuk District Court.

Opinion by HALL, J. Orr commenced this suit before a justice of the peace of Keokuk county. This cause of action is stated in the transcript as trespass and damages. There appears to have been a regular petition filed by the plaintiff, which was mislaid during the trial. There was a judgment for the plaintiff before the justice, and an appeal taken by defendant to the district court, where a rule was made upon the justice to send up the petition. This rule is answered by the justice, by sending up the original petition, stating that it had been on the trial, but accidentally put up with some papers of the plaintiff and carried off.

On the trial in the district court, in the place of issues, eight interrogatories were propounded to the jury, as follows:

"1. Did the defendant take rails, as charged, off from the land described?"

"2. Was the plaintiff in possession of the premises described in the petition, at the time the rails were taken?"

"3. Was the agreement between Huston and Boone, that Boone should enter the said land upon equal shares—Huston to have his choice of shares.

4. At the time the rails were taken off, had Huston notified Boone that he would take the land described as his.

5. At the time the rails were taken, had Orr any written contract with Boon for the land?

6. At the time the rails were taken, had Boon the legal title to the land?

7. What was the value of the rails taken by Boon?

8. What damages did plaintiff sustain by reason of Boon's taking the rails, in addition to the value of the rails?

The jury returned an affirmative answer to all the interrogations, except the 4th and 5th, and assessed fifteen dollars or the value of the rails, and five dollars damages; upon which judgment was rendered for plaintiff.

There are several errors assigned against this record, all of which are embraced in two points. 1. It is objected that the justice's docket does not show a cause of action against the defendant. 2. That the court below erred in rendering a judgment for the plaintiff below, upon this verdict.

The justice's docket is certainly up to the ordinary standard of those official documents, and the petition having been found, removes the otherwise plausible causes for complaint. The law does not require a justice to copy the petition into his docket, where it is filed in writing. If the petition, with the docket, shows a cause of action, the law is satisfied.

The finding of the jury, under the interrogatories propounded by the court, ascertains that Boon, the defendant below, held and owned the title to the land on which the alleged trespass was committed. That Orr, the plaintiff below, was in possession of a close upon the land, and that the defendant below, entered the close and carried off the rails, thereby exposing the crop growing within the enclosure to damage. That the value of the rails taken, was *fifteen dollars*, and the damage, aside from taking the rails, was *five dollars*. The court rendered a judgment upon this special finding for twenty dollars and cost of suit.

The doctrine is well settled, that rails laid into a fence

Boon v. Orr.

upon land are a part of the freehold, and the property of the owner of the soil. *Burleson v. Teeple et al*, 2, G. Greene, 542; ^(*) *Seymore v. Watson*, 5 Black., 555; *Blair v. Worley*, 1 Scam., 173; *Goodrich v. Jones*, 2 Hill 142.

The judgment of the court below makes Boon pay Orr for his own property, and in which Orr had no title, except mere occupancy, and also for the damage done to the possession. From the verdict, Orr had no interest except naked possession, against which a trespass could be committed; he had no right to damages for an injury to anything else. The rails and their value were proved by the jury to belong to Boon. It was clearly error in the court below to give judgment for the plaintiff, on that verdict, for more than five dollars.

The judgment of the district court will therefore be reversed, and judgment rendered in this court for five dollars. The cost of this court to be taxed against the appellee.

Judgment reversed.

Templin and Casey, for appellant.

^(*) *Smith v. Carroll*, ante 146.

Martindale v. Kendrick.

MARTINDALE v. KENDRICK.

Where the husband and wife, and their only child were drowned by the same casualty, and where the child, surviving its parents for a few minutes, inherited their estate; held, under the Rev. Stat. recognizing the civil law as to degrees of kindred, that the maternal grand-father of the child would inherit the estate in preference to the paternal aunt.

Appeal from Wapello District Court.

Opinion by GREENE, J. This was an action of right commenced by appellant, against appellee.

We learn from the record, that John Carter, acquired title to the land in dispute, by purchase, and subsequently he, his wife, and only child were drowned. The mother survived the father, and the child survived the mother, but all were drowned by the same casualty. The child for a few minutes inherited the estate.

In the court below, the question arose whether Mary E. Martindale the sister of John Carter, and aunt of the deceased child, or William Kendrick the maternal grand-father, should become the heir of the child. The decision was in favor of the grand-father, and this is assigned as error.

The Rev. Stat. of 1843, was in force at the time, and so far as applicable, must govern this case.

Revised Statute, p. 722, § 1, provides that "if the intestate shall have no issue, and no father, mother, brother, or sister, his estate shall descend to his next of kin in equal degree," &c. § 5, provides, "that the degrees of kindred shall be computed according to the rules of civil law."

The rule of "*paterna paternis, materna maternis*," is interposed as an objection to the ruling below. It is true the property in this case was purchased by the father, so that the child inherited from the paternal stock, and in the absence of descending heirs, according to the rules of civil

law, the property would ascend and revert to the stock from which it came, and hence, under this just and humane rule of the civil law, the paternal aunt should inherit the property instead of the maternal grand-father. But the sections of the statute referred to above, provide that in a case like the present, "the estate shall descend to his next of kin in equal degree," and that the degrees of kindred, shall be computed according to the rules of civil law. If the claimants in this case were of kin in *equal degree*, the property under the rule "*paterna paternis*," would necessarily go to appellants.

But the next of kin, under our statute, must take the property, and the next of kin by the civil law is the maternal grand-father. The grand-son is in regard to the grand-father, in the second degree in the direct line; while uncle, or aunt, and nephew, are only in the third degree of the collateral line.

By the civil Code, of La., Art. 910; "When the deceased has died without descendants leaving neither brother or sister, nor descendants from them, nor father or mother, nor *ascendants* in the paternal or maternal lines, his succession passes to his collateral relations." In this case the intestate had in its grand-father, an ascendant in the maternal line, and hence the property could not go to his aunt, a collateral relation.

Judgment affirmed.

Smith, McKinley and Poor, and *A. Hall*, for appellants.

Geo. G. Wright, for appellee.

SINNAMON v. MELBOURN *et al.*

Where a receipt was given by plaintiff, after the suit was commenced, but before the trial, on obtaining payment of defendant "in full of all debts, dues and demands," it was error, on the trial, to reject the receipt when offered in evidence.

Where the defendant offered to prove by a competent witness, "how much he had paid the plaintiff," the testimony should not have been rejected.

The Code, in directing oral pleadings to be reduced to writing by the justice of the peace, is directory, and a party should not be prejudiced if he neglects that duty.

On a trial before a justice of the peace, a general denial of indebtedness will be presumed, if nothing appears to the contrary.

Appeal from Wapello District Court.

Opinion by HALL, J. This suit was originally commenced by Whipple, as the next friend of Milbourn, against Sinnamon, before a justice of the peace. The demand was for work and labor of Melbourn whilst a minor. There was a trial and judgment before the justice, in favor of the plaintiff, whereupon Simamon appealed to the district court. On the trial in the district court, Sinnamon offered in evidence a receipt dated March 7th, 1854, which date was after the suit was commenced, but before the trial before the justice, and had been offered in evidence before the justice. The receipt was as follows: "Received fifteen dollars, in full for all debts, dues and demands, and costs, up to this date from Thomas Sinnamon. Witness, Wallace Milline. THOMAS MELBOURN."

The plaintiff objected to giving the receipt in evidence, and the court sustained the objection, and ruled that the receipt should not be given in evidence; defendant excepted. The defendant then called a competent witness and asked him "how much defendant had paid Melbourn?" This was objected to, and the objection sustained. Errors are now assigned against the decisions of the court below, in excluding the receipt and the evidence of the

witness. The docket of the justice does not specify the state of the pleadings.

This court has decided that payment may be given in evidence, in actions upon contract, under the general denial of indebtedness. Under § 2284 of the Code, the pleadings "may be written or oral." Where they are oral, the justice is directed to write them down in his docket. It is impossible to look over this record without being satisfied that the defendant below resisted the plaintiff's demand at every stage of the proceeding; and we cannot resist the conviction, that the case was tried before the justice upon the merits as presented by the denial on the part of the defendant of the plaintiff's right to recover. The Code is directory to the justice to reduce the pleadings to writing when they are oral, and it ought not to prejudice the parties, if he does not do so. When there has been a trial of the cause before the justice, a general denial of indebtedness will be presumed, in the absence of anything to the contrary. Some charity is due to these tribunals.

It is contended that a minor, after suit is brought, has no right to settle the cause of action. This point was not necessarily before the court below. The receipt would tend to prove that the plaintiff had received fifteen dollars, and justice required that he should not again collect the same sum. If the minor was paid, the law was satisfied, and Sinnamon should be allowed for the payment. Code, § 1490; 3 Hill, 149.

We think that the receipt was improperly rejected, and that evidence of payment was improperly excluded by the court below.

Judgment reversed.

H. B. Hendershott, for appellant.

Whitecomb v. Holloway.

WHITCOMB v. HOLLOWAY.

The neglect of a justice to make his returns to the district court, at least five days before the next term, is not good ground for dismissing the appeal.

Appeal from Mills District Court.

Opinion by GREENE, J. N. N. Holloway recovered judgment in an action of replevin before a justice of the peace. Defendant appealed. In the district court, plaintiff moved to dismiss the appeal, on the ground that the justice had neglected to make his return to that court, at least five days before the term, as directed by the Code, § 2340. Motion granted.

This decision is erroneous. The appeal appears to have been regularly taken more than ten days before the term of the district court, and it was the duty of the justice to make his return at least five days before that term, but his neglect to do so could not destroy the plaintiff's rights under the appeal. It might justify a continuance of the cause, but it could not authorize the court to dismiss the the appeal.

The appellant had performed the requirements of the Code in perfecting his appeal, and cannot be deprived of that right by the laches of the justice in making his returns to the district court.

The judgment of the court below, is therefore reversed, with directions to entertain the appeal and to grant a trial *de novo*.

Judgment reversed.

Wm. Penn Clarke, for appellant.

H. D. Solomon, for appellee.

Dean v. Morris.

DEAN v. MORRIS.

Purchasers at judicial sales must take notice of the titles for which they bid.

A purchaser cannot avoid his bid at a sheriff's sale, by showing a defective title in the judgment debtor.

Fraud not sufficiently charged, by averring that the coroner and attorney knew that the title of the land sold on execution by the coroner was defective.

Appeal from Van Buren District Court.

Opinion by HALL, J. Morris as coroner of Van Buren county, had several executions in his hands in favor of divers parties, against Morlow the sheriff. The executions were issued upon judgments in Van Buren district court. The executions had been levied upon several tracts of land, amongst them was the north-east quarter of north-west quarter of section twenty-five, township sixty-nine, range ten. After advertising, the property was offered at public sale, when Dean bid for said tract of land, the sum of one hundred dollars, and the same was struck off to him by the coroner, Morris. Dean ascertained that Morlow, had conveyed this land to one Lusk, before the date of the judgment, by deed of general warranty; that Lusk had filed his deed for record and had the regular indorsements and certificate from the recorder, but the recorder had misdescribed the land on the record in recording the deed. Thereupon he refused to pay the sum bid, and sets up those facts; and charges, that the coroner and the judgment creditors of Morlow, and their attorney, had full notice of the sale of the land by Morlow to Lusk, and the mistake of the recorder in recording the deed, and charges, that the levy and sale of the land as Morlow's "was a fraud upon bidders at said sale," and that he has received no consideration for said sum of money, and that he has received no certificate of purchase or deed. The plaintiff below demurred

to the answer, upon which there was a judgment for the plaintiff, for the one hundred dollars and costs.

The doctrine is well settled, that purchasers at judicial sales must take notice of the title for which they bid. *Caveat emptor.*" Let the purchaser beware, is a legal maxim, and a note of universal warning to all who deal with auctioneer officers of the law. These officers do not profess to have a knowledge of the title of property they offer for sale. They give no warranty, nor profess to sell any interest beyond that of the judgment debtor. A purchaser cannot avoid his bid, or excuse himself from paying the amount by showing a defective title in the judgment debtor. 4 McLean, R., 607; 3 Scam., 502; 4 Scam., 486; 1 Gilman, 220; 8 Blackf., 432; 2 Carter, Inda., 526.

The allegations in the answer that the facts of levying on land and offering it for sale, that the coroner and attorney of judgment creditors knew Morlow had no title to the land, "was a fraud upon bidders at the sale," is not a sufficiently distinctive charge, and allegation of fraud so as to present that issue; and even if that defense had been fully presented, there is some doubt whether a court of law would entertain the issue in that shape. Without giving any intimation on this point, we cannot but think that a court of equity, would be the most appropriate *forum*.

Judgment affirmed.

C. C. Nourse, for appellant.

PORTER *et al.* v. WILSON.

Where a petition, founded upon an attachment bond, avers that "the attachment was wrongfully and wilfully sued out by the defendant, when in truth and in fact the plaintiff was not indebted to them in any amount whatever," it is sufficient without any averment as to belief.

In an action upon an attachment bond, where the plaintiff seeks to recover on the ground that he was not indebted to the attachment plaintiff, the petition need not give the substance of the affidavit.

Appeal from Louisa District Court.

Opinion by GREENE, J. Action on an attachment bond. The petition avers that the attachment was wrongfully and wilfully sued out by the defendants, Porter and Lucas, and that the plaintiff was not indebted to them. The defendants demurred to the petition, and for causes allege: 1. That the petition does not state that the defendant had not sufficient cause for believing that the facts stated in the affidavit for the attachment were true. 2. That the affidavit or the substance of it is not stated in the petition. The demurrer was overruled, and judgment rendered against defendants.

1. In support of the first cause of demurrer, appellants refer us to the case of *Winchester v. Cox*,^(a) but we think that case has no analogy to the present. In that case the attachment was claimed to be wrongful upon the averment: "That the plaintiffs were not about to dispose of or remove their property, without leaving sufficient in the state to pay their debts, with intent to defraud their creditors." It was held that this averment might be true, and still the attachment not be wrongful, if they had given sufficient cause for believing that they were thus disposing of their property; and that the petition should have presented the true issue: "That there was

(a) *Ante* 121.

not sufficient cause for believing the fact." This petition presents an entirely different issue. It claims that the attachment was wrongful, because the plaintiff was not indebted to the defendants in any sum whatever, when they swore out the attachment against him. If there was no indebtedness, it follows that there was no ground for an action, and *a fortiori* none for the auxiliary process of attachment. This averment of no indebtedness, strikes at the very foundation, and charges the entire proceedings as being not only wrong but oppressive.

An indebtedness is a reality. It is not a matter of mere speculation or inference, of supposition or belief, in relation to the motives of another. It is an absolute verity, and should be best known to him who claims it. A plaintiff is not dependent upon mere belief; he should know that the defendant is indebted to him before he is justified in attaching his property, and perhaps thus inflicting an irreparable injury. The evidences of an indebtedness are controlled by the creditor, and should be best known to him. He acts upon actual knowledge, not belief. A plaintiff should know that he has a legal demand against the defendant, before proceeding against him by attachment, and if he does proceed against him without such a demand, he cannot avoid placing him *in statu quo*, by claiming that he had sufficient cause for believing that defendant was indebted to him. A party should never think of an attachment without knowing that he has a good cause of action. If, after knowing that, he has sufficient reason for believing that his debtor is acting in reference to those matters in the manner specified by the Code; then, and only then, will he be justified in that violent process.

In *Winchester v. Cox*, we use this language: "If the conduct and reputation of the debtor, was that of a reliable and solvent business man; or if he was not legally indebted to the plaintiff, he might then assume

Porter v. Wilson.

that the attachment was wrongful, and recover damages upon the bond."

2. in this case, under the averment of "no indebtedness," we can see no reason why the petition should give even the substance of the affidavit. The action is not found upon the affidavit, and as the petition contains a statement of the facts constituting the cause of action, and explicitly claims a remedy upon the bond, we cannot understand why the affidavit should be deemed material. In a case like the present, it is not necessary that the petition should make any averments in reference to the affidavit; and we conclude that the court below did not err in overruling the demurrer.

Judgment affirmed.

J. Butler, D. C. Cloud, and H. O'Connor, for appellants.

Starr and Phelps, for appellee.

HEICHEW v. HAMILTON.

In an action upon a contract, in which the defendant sold land, as a tavern stand, to the plaintiff, under the express stipulation, as an inducement to the purchaser, that the defendant should discontinue tavern keeping at his residence near the land sold; held, that such contract was violated by occasionally keeping travelers for pay; that the defendant could not be justified in entertaining any part of the traveling public for compensation, and that the plaintiff need not prove special damages.

Where there has been a previous recovery on the same contract, the plaintiff may set up such previous recovery, by way of estoppel, to show that certain stipulations in the contract, as conditions precedent on his part, had been complied with, and the defendant was estopped from denying all but the subsequent breach and damage.

Appeal from Dubuque District Court.

Opinion by HALL, J. This case was originally commenced before a justice of the peace, and appealed to the district court. The suit was brought upon a contract, by which the defendant sold the plaintiff a tract of land for the purpose of a tavern stand, and in the sale, as a part consideration, agreed that as soon as the plaintiff had erected suitable buildings, and was prepared to keep tavern, that the defendant, who had previously been engaged in that business, would quit the business in favor of plaintiff. The defendant denied the contract; and also, the breach of contract; and also, that plaintiff was prepared to entertain the traveling public. The plaintiff interposed to defendant's answer, by way of estoppel, a judgment in plaintiff's favor against the defendant in the district court of Dubuque county, in a suit brought upon the same contract.^(a)

Upon the trial below, the court instructed the jury "that before the defendant could recover he must prove special damages; that having declared upon a special con-

(a) *Heichew v. Hamilton*, 3 G. Greene, 596.

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tract, the plaintiff must prove the special contract as set forth ; that before the plaintiff could recover, the plaintiff must prove that the defendant kept a tavern ; and that occasionally keeping travelers for pay does not constitute tavern keeping ; that if the jury believed that there was any contract, and that such contract was that defendant should quit tavern keeping when plaintiff was prepared to keep tavern, the plaintiff must prove that he was prepared to keep tavern before he can recover damages for defendant's tavern keeping." The plaintiff below took exceptions to these instructions to the jury, and assign their errors thereon.

In the instructions given by the court, the idea is clearly advanced to the jury, that, to constitute a breach of the contract, nothing short of the defendant's holding himself out to the world as a tavern keeper, and making a regular and notorious business of keeping tavern, would be sufficient to constitute a breach. In this the court went too far. There certainly can be a point where the contract would be broken, short of an open and shameless public breach and defiance of his clear obligation. There was a purpose and an object which the parties had in view when they entered into the contract, and the defendant was bound to act in good faith, and carry out that object and purpose. To entertain a friend or a stranger, who could go no farther, or persons whom the plaintiff could not accommodate ; to exercise all the benevolence and charity of a private house-keeper, would be no breach of this contract ; but he cannot evade its spirit and requirements by evasive restrictions and limitations in the manner that he serves and entertains the traveling public. He must act in good faith ; he must quit the business ; not half quit and half not.

The true rule is one that common honesty will instantly see, define and apply. The defendant could not entertain any part of the traveling public for the mere purpose of receiving the compensation that he might receive, without

violating this contract. He must have been influenced by some other motive than mere pay, or he acted in bad faith towards the plaintiff.

The record of the former recovery was pleaded by plaintiff, by way of estoppel, and had the effect upon the record to estop the defendant from denying every fact in issue between the parties, except the breach of the contract, and the amount of damages. The plaintiff had established the fact that he was prepared to keep tavern on the first trial, or he could not have recovered. That fact once established is presumed to continue until its contrary is shown. The instructions of the court that the plaintiff must prove that he was prepared to keep tavern, was erroneous. When the plaintiff had proved a breach of the contract, he was entitled to at least nominal damages, and it was not required of him to prove special damages. In cases of this kind, it is difficult to fix upon a rule by which damages can be satisfactorily ascertained. It is not expected that a plaintiff can prove a precise sum abstracted from his profits by a violation on the part of a defendant, but the jury should be careful to find sufficient damages to admonish the defendant that, "honesty is the best policy."

Judgment reversed.

Smith, McKinlay and Poor, for appellant.

Clark and Bissell, for appellee.

ABBOTT v. WHIPPLE.

Where a party seeks to recover damages for the wrongful suing out of an attachment, his action should be founded on the attachment bond.

Where a petition is founded upon an attachment bond, the allegation that "the attachment was wrongfully sued out with wilful wrongfulness," need not be accompanied with the averment that the defendant had no sufficient reason to believe the facts in the attachment affidavit to be true.

Appeal from Louisa District Court.

Opinion by GREENE, J. The original petition filed in this case by Edward C. Whipple, against Charles H. Abbott, claimed to recover damages to the amount of \$1000, for suing out with wilful wrongfulness, a writ of attachment against said Whipple. The petition made no reference to the attachment bond, and claimed the damages as an item of account. An amended petition was filed, which averred that an attachment bond had been filed before the attachment was sued out, and "that the attachment was wrongfully sued out with wilful wrongfulness." To this amended petition a demurrer was filed, setting forth as special cause the following:

1. The suit is not, as it should be, brought on the attachment bond.

2. The said plaintiff, does not aver in his petition, that the defendant had not good reason to believe the facts in the attachment affidavit to be true.

The demurrer was overruled by the court, and that ruling is assigned as error. The amended petition has a copy of the bond annexed, but it does not in any way claim to recover upon the bond. It merely alleges that a bond was filed and gives the names of the obligors; and yet it declares no cause of action against them upon the conditions of the bond. This right of action for damages resulting from a wrongful suing out of an attachment, is authorized by the

Code, § § 1853, 1854. But these sections require a bond and security from the plaintiff, to be approved by the clerk, for the use of the defendant, conditioned that the plaintiff will pay all damages which the defendant may sustain by reason of the wrongful suing out of the attachment. This gives the injured party a plain and adequate remedy, "in an action on such bond." § 1854, "nor need he wait until the principal suit is determined before he brings suit on the bond." As the petition in this case does not claim to be founded on the bond, and is not against the obligors, it cannot be regarded as a suit on the bond, and consequently does not come within the two sections of the Code to which we have referred. It does not therefore contain a statement of facts constituting a cause of action. Upon this point then, we think the demurrer should have been sustained.

2. The second cause of demurrer is, we think, without foundation, under the amended petition, but it would have been good against the original petition which merely denied the facts in the affidavit, upon which the attachment was authorized, without averring that the defendant had not sufficient reason to believe those facts, as required in *Winchester v. Cox*; ^(a) but the amended petition avoids this difficulty. It charges directly, though in general terms, that the attachment was wrongfully sued out, and seeks to recover exemplary damages, by avouching that it was sued out with wilful wrongfulness. True, the statement of facts is not very specific, but if this statement was made in a petition founded upon the bond, with the bond annexed as a part of the petition, it would be good, because it is in the language of the Code, and founded upon a written instrument. Although the allegations are broad, still they "convey a certainty of meaning," they show a "substantial cause of action," if that action had been founded upon the bond; and they tender an issue of facts that may be specifically

(a) *ante*, 121.

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admitted or denied by the answer. If denied, the only questions to be determined by the jury, are: 1. Was the attachment wrongfully sued out? 2. Was the attachment sued out, wilfully wrong?

Under such an issue, it is true the plaintiff would not be confined to any specific part of the proceedings, to show the wrongful act, and still it is such as the conditions of the bond contemplate, and it is authorized by the Code.

Judgment reversed.

J. Scott Richman, H. O'Connor, and D. C. Cloud, for appellant.

J. Butler, for appellee.

THOMPSON *et al* v. CAMPBELL.

Where proceedings come before the district court by change of venue, with no other record or papers than the petition and order for the change of venue, the suit may be dismissed.

Appeal from Jefferson District Court.

Opinion by HALL, J. On the 15th day of March, 1854, there was filed in the office of the clerk of the district court, of Jefferson county, a petition for a change of venue in the above cause, with an order from the judge of the fifth judicial district, directing and ordering such change. These papers were regularly certified and transmitted to Jefferson county, by the clerk of the district court of Marion county. No other papers accompanied the petition, and order for the change of venue. These papers were filed by the clerk of Jefferson county, and the case was docketed for

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the March term. At the March term, the court dismissed the suit for want of jurisdiction. The plaintiff appealed to this court.

We cannot see what other order the district court could have made. By the neglect of somebody, there was no cause for that court to try, and no question to adjudicate except whether the case should remain on the docket as a matter of form. We cannot inquire into the proceedings, had in Marion county, only as they have been certified to Jefferson county, but if the plaintiff has been injured by the neglect of any of the officers, he has his remedy against them.

Judgment affirmed.

J. E. Neal, for appellants.

Charles Negus, for appellee.

Pinkney v. Pinkney.

PINKNEY v. PINKNEY.

Where a petition, filed by the husband, alleges as cause for divorce, "that she has wilfully absented herself from her home with the petitioner for the space of three years," it is fatally defective, unless it also alleges that she absented herself "without sufficient cause."

In a petition for divorce it is not sufficient to allege, "that he and his said wife cannot live in peace and happiness together, and that their welfare requires a separation." The petition should allege facts and circumstances that would render the above conclusion "fully apparent." Code, § 1482.

A petition for divorce should distinctly state the facts constituting the cause and should show *prima facie* that the complainant is the injured party before a divorce is decreed by default.

A decree of divorce cannot be justified unless the evidence tends to show that the separation relied upon was wilful, and that the complainant was not instrumental in procuring it; or unless the evidence will justify the conclusion that the peace, happiness and welfare of the parties require it, and that the complainant is the injured party.

A notice by publication not valid, unless ordered by the court, after the original notice was returned. "not found," to the court, at the appearance day therein designated.

An affidavit or proof that a notice and petition were directed through the post office, as required by the Code, should show that the post office to which they were mailed was the usual residence of the defendant, and that they were mailed in sufficient time before the appearance term.

A judgment by default should not be rendered against a party not personally served, until the court is satisfied that every requirement of the Code, in reference to the notice, has been performed.

Appeal from Henry District Court.

Opinion by GREENE, J. Theodore A. Pinkney, filed his petition in the district court of Henry county for a divorce from his wife Sybil M. Pinkney, alleging two causes:

1. "That she has wilfully absented herself from her home with your petitioner, for the space of three years."

2. "That he and his said wife cannot live in peace and happiness together, and that their welfare requires a separation."

The wife being a resident of Florida, notice of the petition was given by publication in the *Iowa True Democrat*. In

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six weeks after the petition was filed, a decree was rendered dissolving the marriage contract on the deposition of a single witness, Isaac Pinkney, who testified :

1. "They have been living separate and apart from each other for the space of two years and upwards."

2. "From my knowledge of the circumstances attending the separation of the parties, I am satisfied that they cannot again live together as man and wife, and that their separation is desirable."

Several objections are urged to the proceedings below, which may be considered under three heads. 1. Is the petition good? 2. Is the evidence adequate? 3. Was the notice sufficient?

1. As to the petition. The first cause of divorce stated in the petition does not aver that she absented herself "*without sufficient cause.*" This omission is fatal. Under the *fourth* cause given in the Code, § 1482, it is necessary for the husband, seeking a divorce, to show that he has not only been wilfully deserted by his wife, but also that she has absented herself "*without a reasonable cause,*" for the space of one year. There may have been good cause for the wilful desertion and continued absence. The husband himself may have been unfaithful and false. He may have refused to his wife, the comforts of a home, and the necessities of life. He may by the severity of his conduct, and by continued acts of flagrant infidelity, have rendered that home intolerable to his wife, and have rendered her absence necessary, or at least reasonable. This averment does not show a *prima facie* case for divorce, and we think the plaintiff equally unfortunate in alleging his second ground.

Our Code, § 1482, provides for an eighth, cause of divorce. "When it shall be made fully apparent, that the parties cannot live in peace and happiness together, and that their welfare requires a separation." There are no facts or circumstances stated in the petition, that can render the above conclusion, "fully apparent," and applicable to the present parties. There is no averment of act, conduct, or disposi-

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tion of the wife, to justify the inference that the parties *cannot* live in peace and happiness together, or that their welfare requires a separation.

A party seeking a divorce, under this head, should state something more than the conclusion sought. He should allege his foundation, make out his case, state facts and reasons sufficient to make the conclusion "*fully apparent*," to the court, that the peace, happiness and welfare of the parties render it necessary to sever the bonds of matrimony.

The petition should not only distinctly state the facts, constituting the cause of divorce, but it should also show, *prima facie*, that complainant is the injured party, in order to admit proof of these essential facts before the court should decree a divorce by default.

A law so unusual, so relaxing in its influence upon the sacred obligations of marital contracts, should not be loosely administered, nor should the petition under it, be bolstered up by latitudinarian intendment. As the petition does not contain averments of facts necessary to be proved, it should have been dismissed.

2. As to the evidence. There is but one deposition in the case as already stated. Defective as are the averments in the petition, the evidence is still more so. It does not show that the separation was wilful, nor that complainant, was not instrumental in procuring it. Nor does it establish any fact or reason to justify the conclusion, that the peace, happiness, and welfare of the parties required a divorce; nor show that complainant is the injured party.

3. The original notice, it appears, was issued, and was returned *non est inventus*, and was inserted for publication on the 4th day of January, 1854, and that at the ensuing March term of court, a decree was rendered against defendant. It is objected that this precipitate method of giving notice by publication, is not authorized. The Code, § 1725, provides that upon a return of "not found," service may be made by publication in some newspaper, &c. The Code does not

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define *to whom*, or *when*, the return of original notice shall be made, before service by publication can be made. But we think, in contemplation of law, that the return should be made to the court, and not to the clerk, and that it should not be returned till the first day of the term at which the defendant is required to plead. We say the writ should be returned to the court, because, in pursuance of law, all process should be returned to the court whence it issued, in order to confer jurisdiction over the party. The object of the process is to bring the party *into court*, and not before the clerk, and when such process or notice is duly served and returned, the defendant is held to be *in court* at the appearance term, and may be proceeded against, accordingly. But if not found, the court may order an *alias*, or even a *pluries* writ or notice to be issued. If satisfied that due diligence had not been used by the said officer, or if satisfied that another effort might secure personal service, the court might, with propriety, order an *alias* to be issued, before directing service by news-paper publication. There is nothing in the Code to prevent this rule of practice. It is a discretionary power that may be judiciously exercised to secure personal service if possible, and to avoid rash and fraudulent action against a party not thus served.

We conclude then, that as the Code does not designate to whom, or when, notice is returnable, the common law rule should obtain that the notice should be returned to the court, at the appearance day therein designated, and thereupon the court may, if satisfied by the return, that the defendant, after reasonable diligence could not be found, order service by publication. The clerk may then determine the newspaper, in which the notice shall be published.

But there is another serious defect in the proceedings to bring the defendant legally into court. There is not proof sufficient to show that a copy of the petition and notice was directed through the post office, as required by the Code, § 1826. The affidavit, in this case, does not prove

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that the post office to which the petition and notice were mailed, was the usual residence of the defendant, nor does it show that it was mailed in sufficient time for her appearance. Judgment by default should not be rendered against a party not personally served, until the court is satisfied that every requirement of the Code, in reference to the notice, has been performed.

Decree reversed.

Wm. Penn Clarke, for appellant.



THE STATE on Relation &c. v. BISSELL, County Judge.

in submitting to the voters of a county a proposition to have the county issue bonds for stock in a railroad company, the form of the vote is sufficiently explicit when it reads: "For the Lyons Railroad," or "Against the Lyons Railroad."

A proclamation directing a vote of the people for or against issuing bonds to a railroad company, under the stipulation that they should be issued "only in the event of said railroad being constructed and running centrally through the county;" held, that the vote being favorable to the railroad, the county judge had a right to issue the bonds on being made satisfied that said road will be built centrally through the county. *Greene, J., contra.*

Appeal from Cedar District Court.

Opinion by HALL, J. The petition in this case sets forth that on the first day of March, 1853, Bissell as county judge of Cedar county, made an order submitting to the legal voters of said county, the question whether the county would aid to construct a railroad to run through the county, by subscribing fifty thousand dollars to the capital stock of the Lyons, Iowa Central Railroad Company; said amount

to be expended only in the event of said railroad being constructed, and running centrally through the county, and only to be applied in the construction of the same within the limits of the county. The payment to be provided for by the county issuing her bonds for the sum of fifty thousand dollars, payable in twenty years with interest at the rate of six per cent. per annum, payable semi-annually. The principal and interest of the same to be liquidated by an annual tax, to be continued from year to year, of two and one-half mills on the dollar, of county valuation, as shown by the assessment roll. The form in which the question was to be taken and voted for, was by ballot; and which was to be printed or written, by those who voted for the proposition: "*For the Lyons Railroad*," and those who voted against the proposition: "*Against the Lyons Railroad*." The election was held on the first Monday of April.

On the first Monday of May, the county court canvassed the polls given in the county for and against the proposition, and it appeared that a majority of all the votes was cast "for the Lyons Railroad;" the result was duly recorded by the court. That on some subsequent day, unknown to the relators, but which the relators charge to have been subsequent to the day when the tax was levied by the county court to pay the interest on the bonds issued. The county judge made an entry on the records of the county court to the effect, "that, on its being made satisfactorily to appear to the county judge, that said railroad will be constructed centrally through Cedar county, and that the said county subscribe fifty thousand dollars to the capital stock of said railroad company, and that the same be paid for by the county issuing fifty bonds of one thousand dollars each, with interest at the rate of six per cent. per annum, payable semi-annually with coupons attached; said bonds to be payable in twenty years, and that in accordance with the decision of the proposition aforesaid, that the principal

and interest of said bonds, be paid by an annual tax of two and one-half mills on the dollar of the county valuation, as shown by the assessment; to continue from year to year until the whole of the principal and interest of said bond are paid, and it is further considered that the county judge make arrangements to secure the expenditure of the means raised by the sale of said bonds within the limits of Cedar county, all of which is in accordance with the proposition decided by the vote aforesaid."

That, on the second day of August, 1853, the county court levied a tax of one and one-half cents on the dollar, of the county assessment roll of said county, for the payment of the bonds issued on account of the Lyons, Iowa Central Railroad.

That said county judge had issued the bonds of the county, to the amount of twenty thousand dollars, to the Lyons, Iowa Central Railroad Company, by which the county is caused to acknowledge itself indebted to said company, in the sum of twenty thousand dollars, payable at the Bank of the Commonwealth, in the city of New York, on the first day of June, 1873, and to pay interest thereon at the rate of six per cent. per annum, on the first day of June and December, in each year.

That said judge is in readiness, and about to issue his warrants to the county treasury, to pay said interest to become due on said bonds, and that said railroad is not yet constructed. The petition charges the issuing of the bonds, and the levying of the tax as illegal, and the acts of the county judge in the premises as an unlawful exercise of his said office, and in violation of law, and prays for a prohibition, &c.

The answer of the county judge, states the submission of the questions to the voters of the county, and the result substantially, as alleged by the relators. That he had issued to the Lyons, Iowa Central Railroad Company, the sum of twenty thousand dollars in the bonds of the county, in payment of the stock taken in said company by the county.

That the company had located their road in accordance with the proposition submitted to the people, and at the time of issuing said bonds and taking the stock of said company, were at work in the vicinity of Tipton, in said county, and were doing a large amount of work, and that the work was in accordance with the proposition adopted by the people. That the company were constructing a railroad centrally through said county; and that the company have done more than twenty thousand dollars worth of work in said county. That the result of the election and vote taken on said proposition, was duly published in accordance with law.

To this answer, the relators filed their demurrer, on the ground that the answer did not show the proceedings to be legal. The court below sustained the demurrer, and rendered a judgment for the petitioner, restraining the county court from levying the tax, and exercising the power claimed. The sustaining of the demurrer by the court below is now assigned for error.

There are several points, made by the relators, which it is not necessary to consider. We shall only allude to those we consider material.

1. It is objected that, the form of the vote or ballot was insufficient, and not in accordance with law." The form of the vote or ballot adopted by the judge, was made to have a direct relation to the proposition of submission. The proposition is clear and explicit, and no voter who is capable of understanding anything, could be deceived or led into error as to the effect of his vote.

2. It is objected that the entry in the record is not in accordance with the proposition submitted to the people. The latter being that the money is to be paid only in the event of the *road being constructed*. The former, the entry being "upon its being made satisfactorily to appear to the county judge that the road is to be built," &c.

This point, as urged in the argument at bar, is wholly based upon the supposed meaning of the language of the

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proposition, as submitted to the people. "The money to be paid only in the event of the road being constructed centrally through Cedar county." It was contended that the county judge had no authority to apply the money in aid of the construction of the road, but must wait till it was completed through the county. The proposition was, whether the county *would aid* to construct a railroad to run through the county, &c. The money to be paid only in the event of the road being constructed centrally through the county. To aid in constructing the road after it is constructed, would be tautology in language; to say they would aid in building the road, and contend that they were only liable after the road was built, is a contradiction in terms. But it is contended that the subsequent clause, which says "*the money to be paid only in the event of the road being constructed,*" &c., is the governing language; that "*being constructed,*" means fully completed. Such a construction will defeat the evident intention of the proposition. It would injure the character of the judge and the people for good sense. The Code does not authorize the raising of money to pay for a road already constructed and completed. It is only a proposition "whether the county will construct or aid to construct" a road, &c., that can be submitted: not, whether they will contribute money to a road already built. The real intention is clear, and that must govern.

3. It was contended that the county could not be a subscriber of stock, or a stockholder in a railroad corporation. This point was not urged, and the same question having been decided at the December term of this court, 1853, in the case of the *Dubuque and Pacific Rail Road Co. v. Dubuque county*,^(a) is not examined. This decision is not intended to sanction or deny the legal validity of that decision, but to leave that question where that decision has left it.

Judgment reversed.

(a) *Ibid.*, 1.

Dissenting opinion by GREENE, J. I cannot agree with the majority of the court in this case. The citizens of Cedar county were called upon to vote for or against the propositions under the stipulations and restrictions contained in the proclamation. In submitting this question to the people, it is expressly declared that the amount shall be "*expended only in the event of said railroad being constructed and running centrally through the county.*" Under this safeguard and explicit condition, a majority of the voters were induced to favor the proposition, and loan the credit of their county to aid in building the railroad; well knowing that the county judge had no authority to issue the bonds or make the expenditure, until that condition was complied with. Had this condition been omitted in the judge's proposition, it is more than probable that the vote would have been against the railroad. It is conceded that the condition must have been performed before the county judge had the authority to give up any of the bonds; that the authority of the judge to act in the premises depended upon the vote; and that a strict compliance with the conditions stipulated in the proclamation, was necessary; and still it is concluded by the majority that the issue of bonds was justified, because the judge entered upon his record, "that being made satisfactorily to appear to the county judge that said railroad *will be* constructed through Cedarcounty," &c. Surely there is great incongruity in this reasoning.

As a condition precedent to the issuing of the bonds, the people in their vote required two things. 1st. That the road should be in a certain condition, to wit: *constructed*. "*Said railroad being constructed*," is not equivocal. It gives no chance to infer a railroad in the future; an is to be, or will be railroad. It is a present entity. The word, "*being*" does not mean "*will be*." The one is present, the other future. The *present* participle "*being*," means "existing in a certain state."—Webster. The word "*completed*," is defined by the same lexicographer as

"finished, ended, perfected, fulfilled, accomplished."
2. The second thing required is, that the railroad shall be "*running centrally through the county.*" I might go again into definitions, if Mr. Webster and all of his profession had not been overruled by the majority opinion in this case. Dictionaries and grammars, should of course, yield to judicial authority. Still I must insist that a railroad cannot be *running* through a county, unless it is *in esse*. A "will be" railroad—a thing *in posse*—cannot be "running."

The vote of the people made the railroad "running centrally through the county," a condition precedent to the payment of the bonds; but the county judge makes the payment of the bonds a condition precedent to the building of the road. And still, this extraordinary and unwarranted assumption of power is bolstered up with the avowal that the vote promised *aid* to construct the road; that it would be "tautology" and a "contradiction" to say that *aid* would be rendered after the work is completed; that "it would endanger the character of the judge and the people for good sense."

Although thus pointedly admonished that my character for good sense is endangered by entertaining the views thus reprobated by my learned brethren, I must still insist, alarming as the hazard may appear, that the *aid* promised in this, as in all similar cases, was conditional; that those conditions, as clearly shown by the record, had not been performed; nor will any sane man venture the opinion that they ever will be performed by the Lyons Railroad Company.

Again, the *aid* promised, was the *credit* of the county, to be made good by a payment in bonds, on the work "being completed," &c. The vote gave the railroad company the *aid* of that *credit*, by promising that the county should pay fifty thousand dollars in bonds, as soon as the work was performed. Other railroad companies, and the business world generally, regard such promises to pay as

very material aid. Why then should this aid of credit be regarded as contradictory and nonsensical in this case?

Besides, I can see no tautology, contradiction, or want of sense in the old maxim, "He is a good paymaster who pays when the work is done;" especially when, as in this case, it is expressly stipulated "that the amount shall be expended only in the event of said railroad being constructed." Until that condition was fully performed, I hold that the county judge had no authority to issue any of the bonds; that those issued by him were without consideration and in direct violation of the popular vote, and therefore should not be considered as valid at law. I conclude, then, that the judgment of the court below should be affirmed.

W. H. Tuthill, for appellant.

W. G. Woodward and *W. E. Leffingwell*, for appellee.

Miners' Bank v. Thomas.

TRUSTEES OF THE MINERS' BANK OF DUBUQUE v. THOMAS.

The trustees of the Miner's Bank of Dubuque, appointed under the act repealing the charter of that Bank, were not authorized to employ an attorney, to be paid from the assets of the Bank, to carry on a *quo warranto* suit against the officers of the Bank. The trustees were only authorized to settle the affairs of the Bank, and could not be justified in paying from its assets, an attorney for doing that which had already been done by the legislature in repealing its charter.

Appeal from Dubuque District Court.

Opinion by HALL, J. The "*Miners' Bank of Dubuque*" was incorporated by the territorial legislature, and had been transacting business as a bank for several years, when on the 21st day of May, 1845, the legislative assembly passed an act repealing the charter, and authorizing "the judge of the third judicial district to appoint two trustees, who were to have full power to settle the affairs of the bank, to sell and convey the personal and real estate thereof, and to collect and pay the debts of the same. To sue for and recover the debts and property of the said bank, by the name of the trustees of said bank, and to divide among the stockholders, the money or other property that remained after the payment of the debts and necessary expenses."

The trustees on receiving their appointment were to take possession of the property and effects of the bank, &c.

The act provides for the trustees to give security, and to report their doings to the judge, and for a final settlement of the affairs of the bank, with the judge of said district. In August, 1845, the judge appointed Benjamin Rupert and John G. Shields trustees, under the act aforesaid, who immediately demanded from the officers of the bank the assets thereof. The cashier of the Bank, under the direction of the directors, declined delivering the property to the demandants. Subsequent to their refusal, the district attorney, James Grant, on his own relation, and by leave

of the district court of Dubuque county, pleaded an information in the nature of a *quo warranto*, against the bank, upon the ground that the president, directors, and company, of the bank, were illegally exercising their franchise. The case was tried in the district court, and taken to the supreme court by writ of error. In the meantime, the appellee, Thomas, had succeeded Grant as district attorney. The appellee refused to prosecute said suit, as district attorney, but agreed with Rupert and Shields, to act as counsel in the case, and attend to other litigation, if they would pay him a reasonable compensation out of the proceeds of the bank when the assets should come into their hands. The compensation was upon that condition, and it was stipulated that they should in no event be personally liable for the fee. Under this arrangement, the appellee went on and attended to the *quo warranto*, and other suits in relation to the bank. After the decision of the *quo warranto* against the bank, by an agreement between the trustees, Rupert and Shields and Mobley, the cashier of the bank; Mobley was permitted to retain the assets of the bank, and to close up its business; so that in fact no assets ever came into the actual possession of the trustees, and the entire business, contemplated by the act of the legislature, as devolving upon the trustees, was farmed out and transacted by this tenant, Mobley.

The case now under consideration, is a suit brought by Thomas, the appellee, principally for professional services, against the bank, in the *quo warranto* case. The pleadings and instructions given and refused by the court below, assume and decide that Rupert and Shields had power and authority to employ counsel at the expense of the owners and stockholders of the bank, to try a suit brought by the state, on the relation of the district attorney, against the bank, to take from them a franchise that they claimed.

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Had this suit sought to charge Rupert and Shields, individually, and the contract allowed a recovery, the law would have sanctioned it, for a private person may be, and often is interested in the dissolution of a franchise of this kind; but as trustees appointed by the judge of the third district, under the act of May 21, 1845, their right and power must come from the act itself; that act assumes—and no other construction can possibly be allowed—that the repeal of the charter of the bank was a dissolution of the corporation. The power, therefore, intended to be conferred upon the trustees, was simply ministerial, to settle its affairs, to sell and convey personal and real estate, to collect debts due the bank, and to pay debts owing by the bank; to divide the residue, after paying the debts and expenses, among the stockholders. This act creates duties and creates powers. The expenses could only arise in the discharge of the duties and a proper exercise of the power conferred. It can hardly be contended that the act of the 21st of May conferred a power upon the contemplated trustees, to do an act which the statute itself declared as its principle object. The franchise of the bank was declared repealed, and the corporation dissolved; and the trustees were merely administrators to settle up the estate. Yet it is claimed that they were empowered to carry on a suit against the resisting corporation, to test the validity of its franchise, that they could draw from the funds of the bank the money necessary to crush and destroy its lawful struggles for existence. The trustees certainly had no power to contract away the assets of the bank for any such purpose. Their powers were limited to such acts alone as pertained to closing the pecuniary matters of the bank, to do what the officers of the bank could do before its charter was repealed; and they were confined to those acts which could only be performed after the assets had been surrendered. They had no powers or duties beyond the mere act of qualifying, until they become trustees *de*

facto, by obtaining the property and money of the bank.

If, after the appointment of the trustees, they found that the bank refused to surrender its assets, and this trust was about to fail for a want of the property and funds to administer upon, they should—as they probably did—report that fact to the proper government officers. It then became the duty of the government to enforce the law by subjecting the bank to its requisitions. The franchise claimed by the owners of the bank, was a part of the prerogative of the government, and the trustees had no individual interest in having it declared forfeited, and it would be a reproach upon the legislature to suppose that they had authorized or appointed trustees to carry on a proceeding of this character. The first section of the “act relating to informations in the nature of *quo warranto*,” &c., Rev. Stat. 504, authorizes the “Governor, or the legislative assembly, to direct the district attorney to file an information in the nature of a *quo warranto*,” against any association of persons who shall act as a corporation, within the territory, without being lawfully incorporated; also, the district attorney to file such information on his own motion. Thus it will be seen that there was no legal necessity or plausibility of right in these trustees interfering in the matter; much less had they the power to squander the property of their *cestui que use*, in carrying on litigation which they themselves were resisting. The legislative act repealing the charter of the bank, and authorizing the judge of the the third judicial district to appoint trustees, making all the proceedings *ex parte*, is the exercise of power that approaches the very verge of constitutional limits, and certainly the courts will not extend the powers conferred by that act by implication.

The instructions of the court below are clearly erroneous. The judgment will therefore be reversed; and inasmuch as there are some items in the account of the appellee that may be a proper charge, as legitimate expen-

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ses of the trustees, the case will be remanded to the district court of Dubuque county for trial *de novo*.

Clark and Bissell, for appellants.

L. A. Thomas, *pro se*.

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HUTCHINSON v. SANGSTER.

An answer, under the Code, should specifically deny ; or admitting, should set forth that which would justify and avoid every material allegation in the petition.

In an action for false imprisonment, the defendant may justify by averring, in his answer, that he was acting as city marshal, and that the plaintiff was so disturbing a worshipping congregation, as make his arrest necessary ; and that he was only confined until he became sufficiently sober, or until he could be taken before a magistrate for examination.

The power to detain an offender in custody, for a reasonable length of time, is inherent to the duties of a peace officer.

Where judgment was not rendered by default, and the question of damages is submitted to the jury, the defendant's right to address the jury is not disturbed by the Code, § 1831.

Section 1831 of the Code should be strictly construed. The constitutionality of this section questioned.

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Appeal from Johnson District Court.

Opinion by GREENE, J. Charles C. Sangster, filed his petition against Robert Hutchinson, claiming \$3000 damages for trespass and false imprisonment. Defendant's answer denies or justifies all of the allegations in the petition. A demurrer to the answer, averring that it "does not show a substantial cause of defense," was sustained. The defendant, resting upon the demurrer, a jury was called to assess damages ; and after the plaintiff's witnesses were examined and cross-examined, defendant's counsel

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asked leave to address the jury, and asked for certain instructions from the court in relation to the question of damages, which were refused.

Verdict and judgment of five dollars against defendant, who appeals and assigns as error.

1. The decision on demurrer.
2. The refusal to permit the attorney to address the jury.
3. The refusal of the court to instruct the jury as requested.

1. Did the court err in sustaining the demurrer to defendant's answer? The answer should specifically deny, or admitting, should set forth that which would justify and avoid every material allegation in the petition. We think the answer in this case sufficiently traverses or avoids, every fact upon which the plaintiff's action is founded. The denials are specific; and in avoidance, the answer sets forth with more than necessary detail, and with sufficient clearness, that at the time of the alleged trespass, the defendant was marshal of Iowa City, and a conservator of the peace; that the plaintiff came into the Baptist church, in a state of intoxication, while the choir of said church were engaged in singing, and with other persons, made a noise and disturbance to the annoyance of the choir; that he was requested by the defendant, as marshal, to leave the church, and thereupon became more noisy, and much enraged, and on being put out of the church, refused to go away; that he threatened and insisted on fighting; that the defendant, in order to prevent a breach of the peace, arrested plaintiff while he was thus threatening to fight, and as he was so intoxicated as to be unfit for examination, and the defendant, not being able to find the mayor of the city, or any other judicial officer, before whom he could be taken for examination, took the plaintiff to the county jail, until such time as a judicial officer could be found, and until the plaintiff became sufficiently sober to undergo an examination; that he was thus necessarily detained

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in jail from one to two hours, and he was then discharged from custody by the mayor of the city, and that this and no other, is the trespass complained of by the plaintiff.

The facts alleged in the answer, and which, so far as well pleaded, are admitted to be true by the demurrer, constitute a good defense to the petition. As marshal of Iowa City, the defendant was a conservator of the peace. Laws of 1833, Code, 9, § 5823.

A peace officer may arrest a person for an offense committed or attempted in his presence, Code, § 2840. In this case, an offense was not only attempted, but actually committed, according to the averments in the answer, which under the demurrer, must be regarded as true. It is an offense—a violation of the public peace, “to make or excite any disturbance in any tavern, store,” &c., “or at any public meetings, or in any other place where the citizens are peaceably and lawfully assembled,” &c. Code, § 2742.

An offense is attempted when a person undertakes to assault and resist an officer, or when an officer is threatened. The answer clearly shows that the officer was justified in making the arrest; and at common law, he had the power to detain the offender till he could be taken before a magistrate for examination. 2 Jacob's Law Dic., 40; 1 Black. Com., 372; 4 ib., 295; 1 Chitty's Cr. S., 19, 26; *Arnold v. Stevens*, 10 Wend., 514.

The averred intoxication of appellant, his consequent unfitness for examination, and the difficulty in finding a judicial officer, justified the detention, for a reasonable time. Two hours, under the circumstances, could not be deemed unnecessary or unreasonable.

The power to detain in custody, for a reasonable time, when an offense has been committed, or attempted, is indispensable to the duties of a peace officer. The power is inherent. The exercise of it, often becomes unavoidable. The answer in the present case shows ample justification.

2. Did the court err in refusing to allow defendant's

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attorney to address the jury? When a judgment is rendered by default, "the defendant may appear at the time of the assessment and cross examine the plaintiff's witnesses, but for no other purpose," Code, § 1831. The court below, evidently regarded this as a judgment by default. But as the defendant did not fail to file his answer, nor "withdraw his pleading," Code, § 1824, it cannot be regarded as default, in contemplation of the Code. The defendant did not withdraw his answer, but trusting to its legal sufficiency, submitted to a judgment on the demurrer. The judgment was rendered as the result of a defective answer, and not in default of an answer. We think therefore, that the defendant's counsel had a right to address the jury on the question of damages, and had a right to claim instructions from the court as to the true measure of damages.

It is not the policy of our laws to exclude a party from a hearing, and a statute having that effect, should not be favored by our courts. It should be restrained to its closest limits, and should only be enforced where a case comes fully within its requirements.

Where a party has a right to a jury trial on any question can that right be constitutionally trammelled by the restrictions of this section? Can a party be thus debarred from a hearing before a jury, or from having legal instructions given, to guide them in their finding? Can these restrictions be enforced, and still the constitutional "right of trial by jury, remain inviolate." These questions might legitimately arise in the case, but as they were not adjudicated below, nor referred to by argument here, they will not now be answered.

Judgment reversed.

Wm. Penn Clarke, for appellant.

J. D. Templin, for appellee.

SPROTE v. MARSHALL.

The decision of a justice of the peace was taken to the district court by writ of error, and the defendant in error had no notice of the proceeding, under the writ of error; held, the judgment rendered thereon in the district court, is a nullity.

Appeal from Van Buren District Court.

Opinion by HALL, J. This cause was originally commenced before a justice of the peace. On the trial before the justice, there was a judgment against the defendant. Thereupon the defendant sued out a writ of error from the district court and the justice certified the cause to that court, where the cause was heard and the judgment of the justice reversed, and the cause remanded to the justice for a new trial, and a judgment rendered against the defendant in error for costs. The plaintiff, in the writ of error, from the district court, gave no notice whatever to the defendant, of the suing out of the writ, or of the pendency of the suit in the district court. The whole proceedings were *ex parte*.

This judgment must be set aside and held as a nullity. Judicial proceedings against a person over whom the court has acquired no jurisdiction through its process or otherwise, are mere waste paper, and will be treated as nullities.

Judgment reversed.

A. Hall, for appellant.

HODGES v. BRETT.

A defendant may appear specially to object to a defective notice; and the defect is not cured by such appearance.

A notice should designate the hour of appearance, and is therefore defective if it names the hour as "11 o'clock, M."

Where jurisdiction depends upon the notice, there should be a strict observance of the statute.

Appeal from Mills District Court.

Opinion by GREENE, J. Suit commenced before a justice of the peace. The original notice required the defendant to appear on "Thursday, the 15th day of December, at 11 o'clock, M." A motion made to dismiss the proceedings, on the ground of defective notice, was overruled, and judgment was thereupon rendered against the defendant. The case was taken to the district court, by writ of error, and the decision of the justice affirmed. The defendant only appeared specially to object to the defective notice, and therefore, the defect was not cured by appearance. The notice should designate the hour of appearance, Code, § § 2279, 2520. The notice in this particular, is ambiguous, and uncertain. It specifies no given hour. The term, "11 o'clock, M.," does not express any known period of time. It is the same, as if no hour of appearance had been named in the notice.

The objection is claimed to be trifling and technical. But the rule resulting from the decision is important. Defendants are entitled to a specific and definite notice of proceedings against them. If the notice may omit the hour, may it not on the same principle omit the day or

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the month? The only safe rule, in cases where jurisdiction depends upon the process, is to require a strict observance of the statute.

Judgment reversed.

H. P. Bennett and W. Penn Clarke, for appellant.

D. H. Solomon, for appellee.

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MILBOURN v. FOUTS.

A special appearance authorized on jurisdictional questions without conferring jurisdiction, by such appearance.

In commencing an action before a justice of the peace, by notice, such notice should contain all that is required by §§ 2272, 2273, 2274 of the Code.

Appeal from Van Buren District Court.

Opinion by HALL, J. Fouts commenced a suit by petition and attachment before a justice of the peace, against Milbourn. At the end of the writ of attachment, is added "and also to summon said Nathan Milbourn, if to be found, to appear before me, a justice of the peace, of the township of Village in said county, at my office, on the 20th day of May, A. D. 1854, at ten o'clock A. M., of said day, to answer to William L. Fouts, plaintiff &c."

The writ of attachment was returned by the proper officer; that the "writ was served on defendant Milbourn, by reading it to him; no copy of petition, or notice demanded." On the day fixed for the trial, the defendant, by his attorney, made a *special* appearance and moved to dismiss the suit, because the notice was insufficient and perhaps to take some exception to the attachment bond. The motion was overruled and the defendant withdrew and

refused to appear any further. The justice entered a default against the defendant, and assessed the damages at ninety-eight dollars and fifty cents, and costs. The defendant Milbourn, sued out a writ of error from the district court, where the judgment of the justice was affirmed.

There are several other points made, other than the one presented in this opinion, but as this one decides the whole case, we omit to consider them. We have decided in the case of *Hodges v. Brett*, ^(*) that special appearance can rightfully be made before a justice of the peace, upon jurisdictional questions without conferring jurisdiction. This was all that was done in this case by the defendant, Milbourn. The question of notice is the only open question for consideration.

Section 2272, of the Code, provides that the notice must state the cause of action in general terms sufficient to apprise the defendant of the nature or the claim against him.

Section 2273, provides that the "notice must be addressed to the defendant by name.

Section 2274, provides that the "notice must state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer at the time, and place, therein mentioned.

The notice, served on Milbourn, does not contain a single requirement made essential by these provisions of the Code. The justice never acquired any jurisdiction over the person of the defendant below, and the judgment was *coram non judice*, and void. The judgment and proceeding will therefore be set aside.

Judgment reversed.

C. C. Nourse, for appellant.

(*) *Ante*, 345.

LEE COUNTY v. NELSON.

All the powers and duties designated by the Code, as devolving upon the county judge, may be exercised by the county court; and all decisions made by the "county judge" are in legal effect the decisions of the "county court;" and from all such decisions an appeal is allowed, as provided by §§ 131 to 135 inclusive.

Appeal from Lee District Court.

Opinion by GREENE, J. The proceedings in this case were commenced before the county court of Lee county, by Catharine Nelson, by presenting her accounts for boarding and keeping paupers. The accounts appear to have been allowed by the township trustees, who had ordered the paupers to be boarded. The accounts were rejected by the county court. Within thirty days, Catharine Nelson presented her petition and bond to the county court, for an appeal to the district court; upon these the county judge indorsed "not accepted or filed;" and the appeal was not allowed.

At the next term of the district court of Lee county, said Nelson filed her petition, praying that court to authorize an appeal. The appeal was authorized accordingly, and the clerk of the county court, in obedience to the order from the district court, sent up a transcript of the records.

In the district court, the prosecuting attorney moved to dismiss the appeal. 1. On the ground that no appeal lies from the acts of the county judge, and that the county court had no jurisdiction over the subject matter of this suit. This motion was overruled by the district court. It is now avowed, in behalf of Lee county, that this ruling is erroneous. It is claimed that the county judge is one thing, and that the county court is another and different thing; that the county judge "is the accounting officer,

and general agent of the county," &c., and that the county court is not; that the county judge could have audited and allowed the account in this case, but that the county court could not; that, therefore, the county court had no jurisdiction over the account, and that the appeal should be dismissed. Such a distinction is not, we think, justified by the Code. The "county judge" and the "county court," are made up of one and the same functionary, and the powers conferred upon one are indiscriminately blended with the other. As "county judge," he is "invested with the usual powers and jurisdiction of county commissioners and of judge of probate." §§ 105 and 106, specify many duties to be performed and powers to be executed by the "county judge;" § 129 enumerates some additional powers to be exercised by the "county court." But all the powers conferred by §§ 105 and 106 may be exercised by the county court. Indeed, the acknowledged jurisdiction of this court is mostly derived from these two sections. The powers conferred by § 129 are comparatively meager; imparting to the court but few of its prevailing and distinctive attributes. The powers conferred upon the county judge are indiscriminately exercised by the county court. The county judge and the county court are one and the same thing. All the powers and duties devolving upon the one, may be exercised by the other. This is obviously contemplated by the Code, in declaring that "The county court shall be considered in law as always open." § 125. The 5th, 6th and 7th divisions of § 106, direct the "county judge" about keeping "minute books," "road book," "separate books for the probate business," and the "warrant book." § 128 makes these very books "constitute the records of the county." The only books that are to be kept separate from the other business of the county, are the probate records; § 139. By other sections the county court is authorized in various ways to act ministerially. All official acts of the county judge, then, are acts of the county court, whether judicial or ministerial; and so far

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as jurisdiction goes, county judge and county court are convertible terms. All decrees and decisions made by the county judge, are in fact and legal effect, the decisions and decrees of the county court; and from all such decisions both ministerial and judicial, an appeal is allowed under § 131; and when a party entitled to an appeal fails, without fault on his part, he may apply to the district court, which may authorize the appeal to be taken; § 134.

In this case, the county court did not allow the appeal, although due diligence had been used by the appellant; consequently the district court was authorized to allow the appeal, if there was a decree or decision of the county court to appeal from. The record entry from the county court shows, that on the 14th day of April, 1852, "a bill was presented to the *court* for allowance, and filed in favor of said Catharine Nelson, for, &c., and amounting to the sum of one hundred dollars; and the *court* being advised in the premises, orders that said bill be rejected." Here then is a decision made by the county *court*, and taken from the county judge's "minute book," which we have seen, constitutes a part of the records of the county court. It is, then, a decision of the county court, upon a subject matter conceded to be within in its jurisdiction, and from which an appeal is authorized.

Judgment affirmed.

J. M. Beck, for appellant.

Rankin and Love, for appellee.

Baade v. Orten.

BAADE v. ORTEN.

The district court may, by rule, require the docket fee in appeal cases to be paid by a stated time, and in default of such payment, may dismiss the appeal, but cannot in addition impose a penalty upon appellant.

Appeal from Dubuque District Court.

Opinion by HALL, J. This was an appeal from a judgment of a justice of the peace to the district court, by Baade, the defendant, in that court. The transcript was duly filed in the district court. By the regular rule of that court, the docket fee must be paid by noon of the second day of the term, or the cause will be dismissed with damages. The docket fee was not paid until the morning of the third day, but it was paid before any steps were taken by the appellee to dismiss under the rule. After the fee had been paid, the appellee moved the court to affirm the judgment with ten per cent. damages and cost, which motion was sustained and judgment accordingly rendered for appellant. The appellee excepted, and assigns for error, the rendition of the judgment of the district court, affirming the judgment below, and for rendering ten per cent. damages.

The rule of the district court in relation to appeals in this respect is peremptory, and we see no error in the courts enforcing its own rules. The parties must observe and obey them.

We can find no authority for the court to fix a penalty on a party for not paying a docket fee by noon of the same day of the court. The *ten per cent. damages*, inflicted upon the appellee, is certainly unauthorized. That part of the judgment will therefore be reversed. The judgment

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of the court, affirming the judgment of the justice, is affirmed.

Judgment affirmed.

J. Burt and B. M. Samuels, for appellant.

Geo. L. Nightingale, for appellee.

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BARBER v. SWAN.

A writ of attachment should show *prima facie*, a compliance with the Code and if materially defective, it cannot be amended, and may be quashed on motion.

Appeal from Johnson District Court.

Opinion by GREENE, J. This suit was commenced by Horace H. Barber, against Charles J. Swan. A writ of attachment was issued. On motion, the writ was quashed, and the court refused plaintiff's application to amend. This ruling of the court is assigned for error.

The paper in this case, called "a writ of attachment," could not easily be recognized as such. It contains but few of the material requisites of such a writ. It does not state any action pending for the recovery of money, nor give the names of the parties to the suit. It does not state the grounds which authorized the court to issue the writ, nor does it even give the name of the plaintiff to the proceeding. It does not show that the indispensable conditions of the Code had been performed, before the process could be legally issued; and does not therefore confer authority upon an officer to attach property. Such a writ should show *prima facie*, a compliance with the Code,

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sufficient to confer authority upon the clerk to issue the writ. If materially defective, as in this case, it may with propriety be quashed.

But it is claimed that the plaintiff below asked leave to amend the writ. If there was not sufficient validity in the writ to authorize the attachment of property, an amendment of the writ could not relate back to the levy so as to make the attachment good. But a process so deficient as the writ in this case—so devoid of the essential requirements to give it vitality and force, could not well be amended under any statute of jeofails. There is no section in the Code that can justify such a complete reformation of an invalid writ, and it may well be questioned whether any section authorizes any amendment of a notice, writ, or process. Sections 1755, 1759, give ample power to the courts to amend, but strictly considered, those sections can only be deemed applicable to pleadings. Under the rigor of the common law, amendments are not permitted, and we have now, in Iowa, no statute of jeofails but the five sections of the Code referred to. There is, then, no authority for the broad and unsafe system of amendments claimed for this writ.

Judgment affirmed.

William Penn Clarke, for appellant.

J. D. Templin, for appellee.

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DAILEY v. REYNOLDS.

In an action of slander, words are *per se* actionable, where they charge a woman "of being a bad character," and "guilty of fornication;" and where such words were spoken falsely and maliciously of a *feme sole*, she is entitled to recover without averring or proving special damages.

Appeal from Lee District Court.

Opinion by HALL, J. The plaintiff in this case brought her action of slander against the defendant. The petition sets out in addition to the usual inducement, that the plaintiff was, at the time of the speaking of the words by defendant, a school teacher, and was engaged in teaching female children, and relied upon such occupation and business, to gain a living. The words charged as slanderous were "that she"—meaning plaintiff—"was not a virtuous woman." "That he," defendant, "believed from what he understood, that she was not a virtuous woman, but was guilty of fornication." In an amended petition, the words are charged, that the defendant spoke and published of, and concerning plaintiff these words: "Miss Dailey, as he believed from information he had received, was a bad character, namely, that said Dailey, was guilty of fornication, and that he—defendant,—was well satisfied that such was the fact. That she, Miss Dailey, had taken hold of his—defendants—arm, and urged him into her room and had placed her arm around his neck, and wanted to kiss him. That he told her it was not right and she replied there was no harm in it." The petition alleges as a consequence the loss of employment as a teacher, general injury to her character and great distress of mind and loss of health.

To this petition, the defendant demurred, on the ground that the words as charged, were not actionable *per se*, and that no special damages were alleged in the petition. The demurrer was sustained as to the first count, but overruled as

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to the second on the ground that the allegation of loss of employment as a teacher, was sufficient to resist a demurrer. The defendant then moved the court for more specific allegations in relation to the loss of employment by defendant, as a teacher, which the court sustained. Exceptions were taken by plaintiff, and these rulings of the court, are now assigned for error.

In many of the states of this Union, and in England, it has been decided by the courts, that to charge a female with a want of virtue and chastity, is not *per se* actionable, and if this question is to be decided by the number of authorities, we would be compelled to sanction a proposition that would have nothing else to recommend it, and which society as now constituted shrink from, with a repugnance bordering upon horror. A female against whom the want of chastity is established, is at once driven beyond the reach of every courtesy and charity of life, and almost beyond the portals of humanity. By common consent, such an imputation is everywhere treated as the deepest insult and vilest, charge, that could be given or inflicted upon the victim or her friends, and the *bowie knife or the cord*, must wipe out the stain, and punish the offender. It is folly to contend that it is no violation of our penal laws, for a female to throw herself away by prostitution; and consequently, not slander falsely and maliciously to fix that character upon unprotected innocence. Our whole natures rise up in rebellion against such a revolting proposition.

The Code, § 2709, provides that, "if any man and woman not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman married or unmarried, is guilty of open and gross lewdness, &c., such person shall be subject to fine or imprisonment." The words set forth in this petition may not be sufficient to sustain an indictment against Miss Dailey, under this section of the Code. The charge is too general; but if it is true that she is guilty of fornication and adultery, if she is not a virtuous woman, and is of bad character, how

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much less is the charge, than a charge of lewd and lascivious association and cohabitation. Does it not in fact amount to both; and how much additional evidence would it require in order to convict her under this section of the Code? Reduce the general charge to particular evidence, prove to a jury that the defendant was guilty of fornication, prove that she was not a virtuous woman, that she had yielded her person to the promiscuous embraces of those who saw fit to solicit her to the act, and even become the solicitor herself; reduce those acts by particular evidence, and what jury would fail to convict her of lewd and lascivious associations and cohabitation. In either view of this case, we cannot but think the words charged in the petition, actionable *per se*, and they having been falsely and maliciously spoken of the plaintiff, by the defendant, she is entitled to recover damages, without proving special damages.

The judgment of the court below is reversed, and the cause remanded for trial.

Judgment reversed.

Claggett and Dixon, for appellant.

Turner and Edwards, for appellee.

DEFOREST v. SWAN.

Where the defendant, in an action of trespass, answered that he took the goods, as sheriff, by virtue of a writ of attachment, a copy of which was annexed to his answer; and where such writ appeared to have been materially defective; held, that a demurrer to the answer should be sustained.

Appeal from Johnson District Court.

Opinion by GRENE, J. An action of trespass by C. J. Swan against G. E. Deforest, for taking and carrying away goods. Defendant answered that he took the same as sheriff of Johnson county, by virtue of a writ of attachment, a copy of which he annexed to his answer. To this answer plaintiff demurred, and the court sustained the demurrer to so much of the answer as justified under the writ of attachment. Plaintiff recovered judgment. It is now contended that the court erred in sustaining the demurrer to this answer as amended. There appears to have been no exceptions taken to this ruling on the trial below, and consequently the objection should not now be entertained. But as counsel for appellee appears to waive this want of exception, we will decide the point presented. The writ of attachment under which defendant sought to justify, is so grossly deficient in substance, so entirely wanting in the essential elements of such a writ, that it could confer no authority upon an officer to take property. It does not state the cause of action, nor the name of the plaintiff, nor the facts and circumstances by which it was authorized. It is *prima facie* void, and could confer no power upon the officer.

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It follows, therefore, that the court below ruled correctly.

• Judgment affirmed.

Wm. Penn Clarke, for appellant.

J. D. Templin, for appellee.

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DAVIS v. O'FERRALL.

In an action for dower to lots in the city of Dubuque, on which plaintiff's husband had a pre-emption right, but conveyed his right, by deed, to B., who thereupon purchased the title from the United States, and subsequently conveyed the same to the defendant; held, that defendant was estopped from showing that plaintiff's husband was not seized of the lots, and that she was entitled to her dower therein. GREENE, J., *contra*.

Where the husband conveyed his title to land, before the Code, and died after it took effect, his widow is entitled to dower for life only, according to the law in force at the date of the conveyance.

Appeal from Dubuque District Court.

Opinion by HALL, J. This was a petition for dower in certain described lots in the city of Dubuque.

The records and proceedings of the court below present the following case :

The petitioner, Jane B. O'Ferrall, was married to Francis K. O'Ferrall, in the year 1834; that about the same year they became residents of Dubuque; that said Francis K. O'Ferrall, soon after their settlement in said city, came into possession of the real estate described in the petition, by virtue of a pre-emption right, and occupied and improved the same; that in 1837, said Francis K. O'Ferrall proved up his pre-emption on said lots, under the act of congress

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laying out the city of Dubuque; that Elijah M. Bissell purchased the said lots and improvements from said Francis K. O'Ferrall, on the 15th of September, 1840, for the sum of five thousand five hundred dollars; that he executed a deed to Bissell for the same, warranting and defending the title against all persons except the United States; that Bissell entered into the possession of the premises under the sale; that afterwards, in order to enable said Bissell to enter said lots from the United States, O'Ferrall relinquished to the United States his pre-emption right; that said Bissell purchased said lots from the United States, and received a patent therefor; that afterwards, Bissell conveyed to Davis the defendant; that petitioner had never relinquished her dower in said lots; that said Francis K. O'Ferrall died on the 5th of December, 1851, and that Bissell and his grantee have held the premises up to the time of filing the petition.

In deciding this case, it is enough for us to know that Francis K. O'Ferrall and petitioner were lawfully married before the conveyance to Bissell; that O'Ferrall was in possession of the premises in which the petitioner demands dower; that he conveyed by deed the premises to Bissell, who entered under the deed, and that he has not been evicted, but has in person or by his grantees, held the possession up to the time of filing this petition.

Bissell having entered into the premises under the deed from O'Ferrall, is estopped from denying O'Ferrall's title, whilst he or his grantee continue that possession. The door is effectually closed against all other enquiry. The authorities appear to be clear and uniform upon this question.

1 Conn. R., 185; 2 Greenlf., 227; 6 ib., 244; 17 Wend. 164; 14 John., R. 22; 7 Cowen, 637; 2 Hill, 303; 5 Wend., 247; Park on Dower, 247 to 253.

The dower should be assigned under the law in force at the time of the conveyance by O'Ferrall to Bissell. This is an estate for life in the one-third part of the premises.

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At the time of the conveyance to Bissell, the law of dower only gave a contingent or inchoate right to the wife, of a life estate. Every other part, except this right of dower, was vested in the husband. He could convey what he legally owned, and on which there was no legal encumbrance, neither inchoate or contingent, and Bissell could safely purchase, without the fear of future legislative enactments, all that O'Ferrall owned and could sell.

O'Ferrall had the right to sell all that the law then in force did not reserve for the wife, in case she survived her husband. The contract of sale was lawful and obligatory; and any act of the legislature, that changed the estate granted by O'Ferrall and purchased by Bissell, would be a clear violation of the obligations of the contract. ^(a)

Judgment reversed.

Dissenting Opinion by GREENE, J. I cannot agree with the majority, that a widow is entitled to dower in a mere pre-emption right to land. It is conceded that the law in force at the date of the conveyance, must govern. At the time, O'Ferrall sold his right to Bissell, the statute of 1839 was in force. This statute gave dower according to the course of the common law. At common law, the widow shall have the third part of all the lands and tenements, whereof the husband was seized in fee simple, or fee tail a any time during coverture to hold to herself for the term of her natural life. 2 Black. Com., 129, 181.

On page 137, this author tells us: "Though the husband had the use of land in absolute fee simple, yet the wife was not entitled to any dower therein; he not being seized thereof." A pre-emption right only gives the person the preference to buy the land at a stated price. The party holding such a right is not in any sense of the word legally seized of the land. He has merely the temporary possession, and the prior right of purchase; the right to become seized. O'Ferrall had the use of the lots only;

(a) See *Davis v. O'Ferrall*. Ante 168.

but was not seized thereof, and could only have become so on paying therefor the stipulated price to the commissioner. At the time O'Ferrall sold his claim on the lots to Bissell, the title, the true legal seizin of the lots was in the United States, and remained there until they were entered by Bissell. As soon as Bissell secured his certificate of purchase from the commissioner, he acquired the absolute title. Dower being entirely a legal demand that can only attach when the husband has acquired a legal seizin of the property, it follows that no dower incumbrance could affect the lots in question, until the legal title was secured by Bissell; he having a wife, she was necessarily the first woman who became endowable of the lots. A party buying of Bissell, was not called upon to go behind his patent from the government.

No purchaser has been expected to go behind the government title. That has been regarded as the fountain head; the only reliable source, the only safe starting point, whence all titles to land in this state are traced. But this foundation to all our titles, has been shaken at least in this instance, and is required to yield to antecedent squatter claims. Vacillating and insecure as those claims are, and having covered a large portion of the best property in the state, serious loss and injustice must be inflicted upon innocent purchasers of property, if the widows of those who have been in possession of claims on the public land, can come in, under the cry of estoppel, bid defiance to government sales and patents, and claim their third of the property, on the ground that their husbands, were for a time in possession, and abandoned that possession to another, who subsequently acquired title. If this doctrine of estoppel can be extended so far as to be applicable to the case at bar, it can be made equally applicable to all squatter claims where the settlers' possession was transferred to a party who became the purchaser.

The fact that a possession is justified by a pre-emption

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right, gives it no additional validity. A pre-emption is not transferrable by deed or otherwise. A transfer works a forfeiture. It follows therefore, that when a pre-emptor sells his claim, or gives up his possession, he forfeits his pre-emption, and all the pretended equities he held under it, and the land is then subject to be entered by the first applicant. As a pre-emption right is not alienable, it follows that there can be no dower or relinquishment of dower, connected with such a right.

Neither can a pre-emption right to buy land, be inherited, it can only be exercised by the party who in person acquires it by actual residence and improvement. If he dies, the right dies with him. A wife can only be endowed of that realty in which her issue might become the heir. 2 Black., Com., 131.

In this case, it seems obvious, that Bissell acquired no title in the land by virtue of the deed from O'Ferrall. He only secured O'Ferrall's relinquishment of the pre-emption, which enabled him to purchase the lots at the government price. To secure such relinquishment, a deed was not necessary. A simple notice to that effect would have secured the same result; consequently, the deed should not have sufficient validity to produce an estoppel.

The doctrine of estoppel is *not applicable to this case*. It would be dangerous to truth, to investigation, and to titles generally, if estoppels are to be so indiscriminately recognized. Bissell's possession, under the purchase, was but temporary, and was subject to immediate ouster by any other party who might have secured the title from the government. Although O'Ferrall was in legal possession of the land by virtue of his pre-emption, Bissell could not acquire such legal possession from him, because a pre-emption possession is not transferrable. Bissell's possession was not authorized by law, until he secured the certificate of purchase from the government. The seizin from the government became permanent, and absorbed all others. He was then in possession under the government, and not under

O'Ferrall's deed. This deed, although one in form, was not one in effect. As a conveyance of title, it amounted to nothing more than a blank piece of paper. Upon its very face it showed the title to the lots to be in the United States, and hence it only purported to impart a claim right to the improvements and possession; and for that purpose a verbal contract was valid. Rev. Stat., 456, § 1. It follows, then, that there is no position taken by Bissell's grantee that is inconsistent with any fact recognized by that deed. In *Warren v. Leland*, 2 Barb., 613, it was held, that where the truth appears in the same deed with other matters which would otherwise work an estoppel, the party that would be so estopped may avail himself of such truth.

A man is said to be estopped, when he has done some act which the law will not permit him to deny. Lord Coke says, "an estoppel is, when a man is concluded by his own act or acceptance, to say the truth." Blackstone defines "an estoppel to be a special plea in bar, which happens when a man hath done some act, or executed some deed, which estops or precludes him from averring anything to the contrary."

In this case, it is true, Bissell received the deed from O'Ferrall; but it is not true that either he or his grantee seeks to controvert anything that they received under the deed. The deed itself shows all that is claimed by appellant. It shows that the title was not in O'Ferrall, but was in the United States. The deed itself shows that the right of dower could not attach to the lots described therein. It in effect guarantees the title to be in the United States and not in any one else. But if the doctrine of estoppel is applicable, Mrs. O'Ferrall is estopped from claiming dower under her husband's deed, as a privy thereto, because it shows that he was not legally seized of the premises.

But the doctrine of estoppel is not applicable to that deed, for another very obvious reason. The deed is inoperative, and has been so ever since Bissell obtained the permanent title from the government. In *Wallace v. Miner*, 6 Ham.,

it is decided that the recitals in a deed which is inoperative or void, does not work an estoppel. See, also, *Sinclair v. Jackson*, 8 Cow., 543.

Nor will the recital in a deed bind those who claim by title paramount to the deed. 1 Greenl., Ev., § 23, note 2; *Carver v. Jackson*, 1 Peters, 1. That Bissell's title was paramount will be readily conceded by all.

There is still another very conclusive reason why the doctrine of estoppel is not applicable to this case. It is a general rule that the grantee is not estopped from gainsaying anything mentioned in the deed, for it is the deed of the grantor only; 1 Greenl., Ev., § 24. True, if the grantee claims title under the deed, he is thereby estopped denying the grantor's title. But the grantee in this case does not claim title under the deed from O'Ferrall, nor does he deny the grantor's recital of title, as set forth in his deed. In *Miller v. Bagwell*, 3 McCord, 429, it is decided that a recital, to amount to an estoppel, must come from the party to be estopped, and not from his opponent. This is directly to the point and most conclusive of this case.

In *Comstock v. Smith*, 13 Pick., 116, it was held that a covenant in a deed that the grantor will warrant against all persons claiming under him, does not estop him from setting up any title subsequently acquired by him. That being the case with the grantor, much less reason is there for estopping the grantee, who made no such deed or covenant, from setting up such subsequently acquired title.

I cannot but feel that the majority opinion in this case has extended the doctrine of estoppels far beyond reasonable limits. This doctrine is at variance with the investigating policy of the law, for it precludes investigation. It is founded on convenience for the prevention of frauds, and should not be carried farther than the objects for which it was established. Hence, we are told by the authorities, that estoppels must be reciprocal and certain to every intent; *Bolling v. Mayor*, 3 Rand., 563; *Lefoye v. Primon*, 3 Mis., 529. Estoppels are not to be favored; *Leicester v.*

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Rehoboth, 4 Mass., 180; *Bridgewater v. Dartmouth*, ib., 273; *Owen v. Bartholomew*, 9 Pick., 520.

Among the authorities cited in support of the estoppel in this case, that which seems to be the most appropriate and on which the most reliance is placed, is the case of *Sherwood v. Vandenburg*, 2 Hill, 303. It may be well to inquire, what analogy has that case to this? In that case, M. died in 1778, and J., his only heir, married the plaintiff in 1783. In 1786, J. gave a quit claim deed to one P. of all lands which were to be granted by the state of New York, to M. as a gratuity for his military services as a Revolutionary soldier; subsequently a patent was issued to M; J. having died, his widow brought ejectment for dower, against a party in possession under title derived from P.; held, that the defendant was estopped from denying the seizing of the plaintiff's husband, and that therefore she was entitled to recover. To justify this conclusion, Nelson, C. J. claimed that under a statute of that state, the legal estate was to be deemed vested in M. the same as if the patent had been issued before his death, and that the title of J. and those claiming under him, were subject to the same incumbrances, by way of dower, &c., as if the patent had been thus issued and the lands had descended to J. the heir at law. Cowen, J. differed with judge Nelson, in this particular and says: "It is settled that such a seizin is not sufficient to confer any right upon the widow." He refers to *Stow v. Tift*, 15 John., 458; and the cases there cited.

Now is there not a wide difference between that case, and the case at bar. In that case the land had been paid for by M.'s Military services, before conveyance by his heir J. the widow's husband. In this case the land was not paid for by O'Ferrall. In that case, the title passed through the husband; in this, the husband never had any title. In that case, the grantee claimed under the deed from the husband; in this, the claim is under an entirely different and paramount title.

And, unfortunately, for the majority opinion, the case in 2 Hill, and all the other cases cited from New York, on this point, have been pointedly overruled by the more recent and better considered case of *Sparrow v. Kingman*, 1 Comst., 242. It is in that case decided, that in ejectment for dower brought against a grantee of the husband, under a quit-claim deed, or against one holding under such grantee, the defendant, is *not* estopped from showing that the husband was not seized of such an estate in the premises as to entitle his widow to dower.

As the majority decision upon this point, reposes mainly upon authorities, which have been so positively overruled; I regret exceedingly, that it should have been made, and I especially regret the necessity of interposing views so much at variance with those expressed by my learned and esteemed associates.

Clark and Bissel, and T. Davis, for appellant.

Smith, McKinlay, and Poor, for appellee.

JEFFERSON COUNTY v. FORD *et al.*

Where F., acting as county treasurer for two years before the Code, obtained subsequently a receipt from B., as county judge, in full for state and other taxes, the county judge not being authorized to receive the state revenue, or settle for the same; and where judgment had been rendered against F. and his security for the amount of state tax which had been paid by him to the county judge; held, that F. could not recover from the county the amount of state revenue paid by him to B., as county judge; that B. became personally liable to F.; but as B. acted in reference to the state fund, without authority, such act could neither bind the state nor the county.

A settlement obtained by fraud, or under false entries and computations, is not valid.

Appeal from Jefferson District Court.

Opinion by HALL, J. The pleadings in this case present that extraordinary confusion and volubility which a most unbridled system could invite. Both sides appear to have an object. The plaintiff to get his hand into the county treasury, and the defendant to keep it out; and both parties appear to have labored under the most bewildering obscurity as to the means by which their object could be attained.

The pleadings appear to present the following points: The plaintiff below was county treasurer of Jefferson county from August, 1849, to August, 1851, when he was succeeded by another person; that at the time he went out of office, he had over nine hundred dollars of the state revenue in his hands, which he had not paid over to the state treasurer; that on the 19th day of September, 1851, he had a final settlement of his accounts as treasurer, with Moses Black, the county judge, which embraced the state, county, school, and lot funds, as the same had come to his hands; and upon said settlement he paid *defendant* the state revenue which he had in his hands, which sum was received and accounted for in the name of Moses Black, as county judge, in full for all the state, county, school and lot funds

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which had come to his hands. That defendant failed to pay over the state funds to the proper officers of the state; that the state had sued him, and securities on his bond, and recovered said amount.

To this the defendants demur, and assign many causes for demurrer, which, in effect, amount to the cause allowed by the Code; that by a fair and natural construction, the petition does not show a substantial cause of action. This demurrer was overruled by the court, and exceptions taken. The defendant then answers, and denies every allegation in the petition, and avers that Ford and his sureties have not paid the judgment recovered by the state; that they have appealed it to the supreme court where the suit is pending; that there were mistakes in the settlement with the county judge; that Ford was allowed for some items, amounting to nine hundred dollars, which had previously been allowed him by the county commissioners; that some items for lots were withheld, and not settled, amounting in all to three hundred dollars, and defendant's claim an off-set, &c. The amended answer sets up fraud in the settlement, and that Ford, by false representation, imposed upon the county judge, and induced him to assume to act as agent for the state; that he turned out county orders; that he deceived the judge by false entries, concealing facts, false additions, estimates and exhibits; and in this manner the whole settlement was a fraud, and that there was no money in fact paid to the judge; that in fact and truth, Ford was still largely indebted to the county for sums of money not accounted for, and for sums allowed in the settlement by the frauds of the plaintiff. The plaintiff demurred to these answers. The demurrer was sustained by the court, and judgment rendered for plaintiff for \$760 03. The defendant excepts and assigns for error, the overruling of defendant's demurrer to plaintiff's petition, and the sustaining of plaintiff's demurrer to defendant's answer.

The act of the legislature of February 25th, 1847, regu-

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lated and fixed the duties of county treasurers, until the first day of July, 1851, when the Code took effect, and which have not been changed by the Code. By this act, a separate tax was levied for state purposes, which it was made the duty of the treasurer to collect and pay over to the state treasurer. He was required to make due return of all moneys collected by him, together with his county and state tax list, to the board of county commissioners, on the first Monday of January, in each year—§ 39,—and to pay into the state treasury the amount of moneys collected by him, on or before the 15th day of February, in each year,—§ 60. The clerk of the board of commissioners, was required to certify to the auditor of state, the amount belonging to the state treasury. The assessment was to be returned to the auditor of state, and the treasurer of each county was to be charged with the amount of state tax according to this copy of the assessment returned to the auditor, and the treasurer could only be released from the obligation of his bond, when the whole amount due the state was paid in or satisfactorily accounted for,—§ 58. Under this act, the state and county revenue is kept entirely separate. The county treasurer dealt entirely and exclusively with the county commissioners, in all matters pertaining to the county revenue, and with the treasurer, and auditor of state, in those pertaining to the state revenue. This court decided in the case of *Ford et al. v. The Board of Commissioners of Jefferson County*, at the last term; ^(a) that nothing would release the treasurer from his bond for the state revenue, but a payment to the treasurer of state, of the amount due on the tax list, or a satisfactory accounting for the non-payment, and that a paying over to his successor in office, or to the county judge, was not a satisfactory accounting for the non-payment to the state treasurer. It follows then, that if Ford did account with the county

(a.) See *Ford et al. v. Jefferson county*, *Ante*. 273.

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judge, they were both acting beyond their legal duties and powers, and could not bind the county or the state. In such acts they cease to be officers, and their doings relate to, and bind them as persons, and nothing more. There is a total want of power in either, to make the settlement for or fix the rights of the state or liabilities of the county. Then the county of Jefferson, through her authorized officers, never settled with Ford, never received anything from him and is liable to him for nothing.

A county is strictly a political corporation, a grant of power to a designated portion of the people, to aid and arrange the machinery of government, for the whole state. It is not designed for pecuniary profit, nor has it any powers but such as pertain to its strict municipal and public character.

The county treasury, could not become the depositee of any funds, but those that the law brings to it. The officers of the county cannot involve the corporation, by unauthorized contracts, nor bind the county by extra-ministerial settlement, and the old maxim "*that he who trusts must pay*," will apply in this case to Mr. Ford, with as much force as it did in the case from whence the maxim originated.

But it is said that it was a mistake, both parties were mistaken, and the county have obtained the money of Ford, and justice requires that it should be repaid to him.

The answer is that mistakes never give power; never create authority; never bind the principle when made by an agent. The mistake in this case, goes to the power; in the officer to act at all, and did not arise in the discharge of a duty, computation or settlement, which the officer had any right or power either to begin or conclude. There is no link or thread by which the act complained of can be connected with the authority to do it. Certainly the county of Jefferson, was not mistaken, for she was not a party to the transaction, she was not there by her legal authorized agent or officer. She was legally incapable of being a party to such a mistake.

Every attribute, duty, liability and obligation of the corporation of a county, is fixed and defined by law. She is strictly and technically a creature of law, and by law, are her duties and obligations alone manifested and her liabilities established.

If Mr. Ford has suffered on this transaction, his recourse must be, if he has any, upon Mr. Black, or the person who was in fault. If there has been any mistake it is between those persons who made the mistake.

This view of the case makes it unnecessary to discuss the question arising upon the judgment of the court, sustaining the demurrer to defendant's answer. This, we think, was equally erroneous with the other. A settlement obtained by fraud, false entries and false computation ; presenting claims previously allowed, we think was no settlement at all, and the balance found due could not be enforced.

Judgment reversed.

Knapp and Clinton, for appellant.

Stagle, Acheson, and C. Negus, for appellee.

TRASK v. KEY.

The original notice for personal service should be returned to the court "not found," before notice can be authorized by publication. Before a defendant can be considered in default, on a notice by publication, it should appear that a copy of the petition and notice had been directed to him through the post office, as required by the Code.

Appeal from Louisa District Court.

Opinion by GREENE, J. An action to foreclose a mortgage against P. P. Trask. Notice returned into clerk's office by the coroner, declaring the defendant to be a non resident of the State. Date of return, July 29, 1853. It appears of record, that notice by publication was commenced on the 25th of July, four days before the return of the original notice. There is no evidence that service was attempted, by directing the notice through the post office, as provided by Code, § 1826; and still the court below decided that the defendant was in default, and rendered a decree against him accordingly. This decree was obviously unauthorized.

The record shows that defendant was a non-resident of the state, and it may well be questioned whether he was even subjected to the jurisdiction of the court. But if he might have been brought within that jurisdiction, the proceedings clearly show that he was not, by any authorized process.

1. The original notice was not returned to the court—"not found"—before the notice by publication was commenced.

2. There was no copy of the petition and notice sent to the defendant through the post office, as required by the Code, §§ 1826, 2497.

At the last term of this court, it was held that notice by

publication is not good unless these directions are observed. ^(a)

Judgment reversed.

J. Butler and H. O'Connor, for appellant.

B. F. Wright, for appellee.



WALLACE *et al.* v. CITY OF MUSCATINE.

Where a city is authorized to grade and regulate streets, and in constructing gutters, culverts and drains, the work is left in such an unfinished, careless and negligent state as to cause water to flow upon and injure private property, the city is liable to the owner for the damages.

Where an incorporated company is authorized to do an act; and where it is so negligently done as to occasion loss and injury to others, the same liability should attach to the corporation, as would attach to an individual under like circumstances.

Appeal from Muscatine District Court.

Opinion by HALL, J. The plaintiffs in this case brought their action against the city of Muscatine, to recover damages sustained by the plaintiff, occasioned by the improper and unskillful construction of certain culverts, drains and gutters, made by the city, by which the water was turned, and flowed upon the plaintiffs premises, situate in said city; and also, that the city, in constructing their works, had left them in an unfinished state, and in such a careless and negligent condition, that a large quantity of water was made to overflow the premises of the plaintiff, occasioning damage, &c.

^(a) *Pinkney v. Pinkney*, 4 St. 3.

To this petition the defendant filed a demurrer, which was sustained by the court below; and judgment was rendered against the plaintiff. The sustaining of the demurrer is assigned for error.

The power and authority of the city of Muscatine to make the improvements that are alleged to have produced the injury complained of, is not denied; and the only question presented for our decision, is as to the liability of the city for damages occasioned from the improper and negligent manner in which they executed their powers and duties, in making those improvements. It has been contended that a corporation, such as this, is governed by a different principle from that applied to individual citizens, and that it cannot be made liable for acts of non-feasance or negligence of its agents, in the construction of its various improvements. We cannot assent to this doctrine, as being sustained either by reason or authority.

That the legislature can create a corporation, and exempt it from duties or obligations which are denied the natural citizen, may perhaps be true; but unless such privileges are expressly conferred, no court ought to give them, by construction or implication. The tendency of legislation and the decisions of courts, is to maintain equality of rights, whether the interests and duties are exercised by a number of persons associated into a corporation, or by private persons. The true principle should be to make the party liable who had the authority to act, and who authorized the act, that occasioned the damage; especially when the damage is consequential. The necessity that the city authorities should have the power to grade the streets, provide drains, gutters, culverts, and such improvements as the public convenience required, so far as these matters are concerned, cannot be denied, and their authority over such matters should be complete. — The interest of the public in the streets and alleys, although it is only an ~~avement~~ ^{avement}, is as perfect as that of a natural person in his fee simple title, and their right to enjoy and

appropriate them to the specific purpose, should not be infringed upon by the real or supposed convenience, or relative interest of any one. The case of *Creal v. the city of Keokuk*,⁽⁴⁾ decided by this court, recognized this doctrine, although the opinion in that case does not, perhaps, as thoroughly keep in view the rights of the public to appropriate what is clearly admitted to belong to them, as it does that of the individual citizen. It will be difficult to establish, upon any principle of universal application, a distinction between the rights of one and the rights of many. Why, if the individual citizen has the unlimited right to use his own property in such a manner as may suit his convenience and wishes, without fear of damages from any source—provided he uses proper caution not to directly damage his neighbor—why a public corporation cannot in the same manner appropriate their property, and subject it to their convenience and use, without being subject to exactions and damages, from those who are discommoded or damaged by such legal use of public property, will most certainly be difficult to reconcile upon any general principle.

The negligent or unskillful manner of using or appropriating the property, whereby damage is produced, is to all intents the same to the injured party, whether occasioned by the acts of a private citizen, or a public corporation, and the law protects him equally against both. There can be no difference, in principle, between the "taking of private property for public use," and the demolition and damage produced to his property, by overflowing it with water. This would not be in the use of their own property, but a destruction of the property of others.

The cases cited by counsel for appellant, we think, are clear upon this point.

3 Hill, R., 532 and 612; 2 Denio, R., 434; 3 Com., 460 and 464; 1 Carter, 281.

(4) Ante 47.

Hall v. McMahan.

THE decision of the court below will be reversed, and the cause remanded to the district court for further proceedings.

Judgment reversed.

J. Scott Richman, for appellant.

J. Butler and *S. Whicher*, for appellee.

HALL v. McMAHAN.

The county court is specially limited in jurisdiction, and has no authority to adjudicate titles to land.

Where the proceedings of a county court are taken to the district court by appeal, and *prima facie* appear unauthorized and extra judicial, the proceedings and appeal may be dismissed on motion.

Appeal from Potawatamie District Court.

Opinion by GREENE, J. E. Hall claimed a deed of the county judge, of Potawatamie county, for a lot in Council Bluffs. The claim was resisted by McMahan and Williams, and the county judge decided that they were the rightful claimants. Hall appealed to the district court. On motion, the appeal and proceedings were dismissed. This is claimed to be erroneous.

The county court is specially limited in jurisdiction, and has not authority to adjudicate questions affecting land title. In the present case, the county judge was only authorized to act as trustee for the claimants of lots at Council Bluffs, and was not invested with judicial authority, to determine questions of title in relation to these lots. His authority then, in relation to the matter before him,

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was exclusively ministerial, and as title adjudications were not within the jurisdiction prescribed for county courts, the proceeding was unauthorized. He was merely authorized to act as trustee *ex officio*. The proceeding not being within the limited power of that court, and extra judicial as indicated *prima facie* by the record, we conclude that the appeal and proceeding were properly dismissed.

Judgment affirmed.

G. E. Stone, for appellant.

Clarke and Starr, for appellee.

GRAVES v. STEEL County Judge.

Where land has been entered by a county judge for town purposes, under the act of 1852, he is a naked trustee, and cannot be sued alone for title to any of the lots in controversy. The city or school district, as *contingent* case, should be joined with him.

Appeal from Potawatamie District Court.

Opinion by HALL, J. This was a petition filed in the district court of Potawatamie county, by Drewsey Graves against Franklin Steel, county judge.

Steel as county judge, had entered the land upon which the city of Council Bluffs is situated, under the act of congress, approved April 6, 1854. The act of congress

merely authorizes the county judge to enter the land in trust, and to turn over the trust according to the act of the legislative assembly of the state of Iowa, approved January 22, 1852, and such other laws as the legislature may hereafter enact.

The act of 1852, requires the county judge to convey "to each person who, as an occupant, may be entitled to the same, such part or parcels, lot or lots of said land, as he or they may lawfully be entitled to" upon his making the proper payment. The unclaimed lots are to be sold at public auction after due notice, and the proceeds of the sale of said lots to be appropriated to building school houses in such town.

These laws make the city or school districts in the city residuary *cestui que use*, for the proceeds of all lots and land entered by the county judge, on which there is no lawful claim. The county judge acts as a naked trustee, having no interest in fact. He is bound to see that his trust is properly executed, but has no power to decide in controverted cases. Where there are two persons claiming the same property, he has no alternative but to withhold it from both until their rights are adjudicated, or if he deeds to either party, that party would take the title as trustee for his opposing claimant, if it should subsequently be so adjudicated where a claim is made by but one person and there are doubts as to the legality of such claim, it is the unquestionable duty of the county judge to withhold the title until the matter can be investigated.

In the case before us, the appellant brought his action against the county judge alone, the real party in interest which is the city or school districts, are omitted, no binding decree could be made, and nothing would be settled by an adjudication between the parties. The district court properly dismissed the petition, but we have no objection to setting aside the order of dismissal, and remanding the cause, with instructions to the court below, to allow the

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appellant to amend upon payment of all costs up to the time of filing the amendment.

Judgment reversed.

C. E. Stone, for appellant.

BURTON v. HILL.

In a case commenced before a justice of the peace, the defendant answered that, "he had paid, and over-paid, plaintiff for all items of account;" held, that this should be considered a denial of plaintiff's demand; and not as a new affirmative allegation, to be taken as true, if not denied.

In actions commenced before a justice of the peace, strict formality and regularity in pleadings will not be required where the provisions of the Code are substantially observed.

Appeal from Dubuque District Court.

Opinion by GREENE, J. Action on account, commenced before a justice of the peace, tried by jury, and verdict in favor of plaintiff, Henry Hill. Defendant appealed to the district court, where a verdict and judgment were rendered against him for the full amount of plaintiff's claim. 1. In the district court, the defendant's answer averred that "he had paid, and over-paid the plaintiff for all items of account," and claimed, that as this allegation was not denied by the plaintiff, it should be taken as true. The court very correctly ruled that the allegation amounted to nothing more than a denial of plaintiff's account, as stated in the notice. To this ruling plaintiff took exception, and refused to offer proof of payment. He now claims that such proof was not necessary under the Code, § 1742. "Each pleading, subsequent to the petition, shall, in relation to every affirmative allegation to which it should respond, contain a

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specific admission or denial, or it must state some sufficient reason for not doing so. Allegations not thus responded to, must be taken as true." It is claimed that defendant's affirmative allegation of payment, should be specifically denied, or taken as true. But where is the defendant's denial of plaintiff's affirmative claim of indebtedness, if this answer is to be considered an independent affirmative allegation? If the answer is not to be taken as a denial of plaintiff's affirmative demand, it follows that his demand must be taken as true. As the pleadings rested, this averment could not be viewed in any other light than a simple denial of plaintiff's claim. A plea of confession and avoidance. It admits the items as charged, but avoids by claiming payment. It amounts to a specific denial of the indebtedness claimed in the notice, and nothing more. It is responsive, for it avers payment of the items of account, and, in effect, flatly denies the indebtedness. It could not be considered a new set off, for the Code expressly forbids any new demand or set off, in the district court; § 2244.

In actions commenced before a justice of the peace, strict formality and regularity in pleadings will not be required. If the requirements of the Code are substantially observed, and justice is fairly administered, the stricter, and more precise formality of higher and more polished tribunals, may well be dispensed with.

Judgment affirmed.

Smith, McKinlay and Poor, for appellant.

J. Burt, for appellee.

DIXON v. THE STATE.

Where the indorsement upon an indictment is in substantial compliance although not in strict accordance, with the Code, it is sufficient if it appears that the indictment was legally found and presented by the grand jury.

A jury, empaneled to try the defendant on an indictment for retailing intoxicating liquors, were sworn "the truth to speak," &c., without being sworn "to try the issue joined," as required by the Code; held, that the jury were not legally sworn.

Error to Marion District Court.

Opinion by HALL, J. The plaintiff was indicted in the court below for retailing ardent spirits. The indictment was indorsed as follows: "Presented to the district court of Marion county, Iowa, in presence of the grand jury, on the 11th day of February, 1852.

A. BELITTER, C. D. C., Marion Co., Iowa.

"Filed February 11, 1853."

A motion was made by the defendant below to quash the indictment on the ground that the indorsements upon the indictment did not show a legal finding or presentation by the grand jury, which motion was overruled by the court and exceptions taken.

A jury was empaneled and "sworn the truth to speak," and a verdict returned against the defendant below. This presents the only material points in the case. The case of *Wau-kon-chow-neek-kow v. United States*, Morris, 332, is a full answer to the first point made in this case. We cannot but think that the indorsement on the indictment is a substantial compliance with the Code. True, it is not fully in accordance with its directions, but there can be no doubt but that the indictment was legally found and presented by the grand jury. The case of *Harriman v. The State*, 2 G. Greene, 285, settles the other point presented. In that case, the record showed that the oath

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administered to the jury was ; "*the truth to speak upon the issue joined between the parties.*" The statute in force at that time presented the form of oath to be administered to the jury. The Code now requires that the jury shall be sworn to try the issue joined, &c. The record shows the form of the oath used, which really amounts to no oath whatever.

Judgment reversed.

J. E. Neal, for plaintiff in error.

D. C. Cloud, for the State.

FRINK & CO. v. WHICHER.

After a cause has been tried before a justice of the peace, and been taken by appeal to the district court, where the venue was changed and the cause continued, it is too late to submit a motion to dismiss on the ground of variance between the petition and notice.

The petition is the foundation of the action, and the notice should conform to it ; and in case of variance, the discrepancy should fall upon the notice. Such discrepancy is cured by appearance.

Where a case is taken to the district court by appeal, errors and irregularities are to be disregarded.

Appeal from Scott District Court.

Opinion by GREENE, J. This suit was commenced before a justice of the peace, by John Frink and company, against the defendant, for cutting and mutilating a hack. Defendant recovered. Plaintiffs appealed to the district court, where the defendant's motion to dismiss was granted, on the ground of a variance between the petition and notice. This motion to dismiss was not made until after

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a change of venue, a continuance of the cause, and other proceedings in which defendant appeared. As the cause had been tried on the merits before a justice of the peace, an appeal taken, and several appearances in the district court, before the motion was made, the objection clearly came too late. If there was a misjoinder of parties, it should have been taken advantage of, before trial. But in this case there appears to have been a variance. The petition is the foundation of the action, and the notice should conform to it. In case of variance, the discrepancy should fall upon the notice. Hence, such discrepancy is cured by appearance.

Besides, on appeal, all such errors and irregularities are to be disregarded; Code, § 2343.

Judgment reversed.

Smith, McKinlay and Poor, for appellant.

W. G. Woodward, for appellee.



PARTRIDGE v. CORKEEY.

The revenue laws of the state authorize the sale of land for taxes, and the subsequent proceeding to foreclose the equity of redemption is not unconstitutional. In general the provisions of the Code may be enforced. The supreme court will only try and determine such matters as appear of record.

Appeal from Jackson District Court

Opinion by HALL, J. The plaintiff in this case, filed his petition in the district court of Jackson county, against the defendant claiming the foreclosure of a tax deed executed

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by the treasurer of said county, for the south half of south west quarter of section twenty-one, and east half north west quarter of section twenty-eight, township 36, north range one east. The petition, shows a sale and deed by the treasurer of said county, to plaintiff, under chapter thirty-seven of the Code, and prays a foreclosure as therein provided.

To this petition the defendant demurred, on the ground that the law under which the land was sold, was unconstitutional and void. That it impairs the right of trial by jury. The court below sustained the demurrer, and dismissed the petition. The appellants assign for error, the sustaining of the demurrer by the court below.

In the argument of the case, it was not insisted that the revenue law was as a whole unconstitutional. The main objection was to § § 505, 506, of the Code, and the absence of any direct provision for a trial by jury. § § 505, 506, of the Code, provide that land may be redeemed after suit is commenced by paying in addition to the amount required before suit brought, the sum of ten dollars and costs of suit, and the owner of the land is prohibited from defending the suit until he has paid or tendered said amount, or shows that no tax was levied on the land, or that he had paid the taxes.

The record in this case, shows that the defendant was admitted to defend the suit, but is entirely silent as to any tender or payments of the amount required by these sections of the Code; nor have the pleadings progressed to a stage where a jury could be demanded or used by the party. As the record stands, the court below decided that a petition to foreclose upon a tax deed, under chapter 27 of the Code, could not be maintained. The decision strikes at the entire law, and assumes that the purchaser or land for taxes under the Code has no remedy whatever against either the owner of the land or the land itself.

The question was not presented to the court, whether the defendant would or would not be admitted to defend before

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he had paid or tendered the ten dollars, and costs, as required by the Code, or whether the defendant was or was not entitled to have the cause tried by a jury. There is no record to sustain the arguments and positions presented by the defendant in this court; and we have no power to decide any other questions than those presented by the records.

The cause is remanded to the district court of Jackson county, for trial *de novo*.

Judgment reversed.

F. Bangs and *J. B. Booth*, for appellant.

Smith, McKinlay and *Poor*, for appellee.

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WARFIELD v. WOODWARD.

In an action of right, the plaintiff offered in evidence a sheriff's deed executed February 22, 1852, by virtue of a sale made December 22th, 1850, showing that the deed was executed a month before the redemption period of fifteen months had expired; but it did not appear that the deed was delivered to the purchaser, before the expiration of that time; held, that the court below did not err in admitting the deed in evidence.

Under the acts of 1843 and 1846, subjecting real and personal estate to execution, the sheriff is not precluded from executing the deed before the purchaser is entitled to it. But if such deed is delivered to the purchaser before the fifteen months have elapsed, it is still equal, at least, to a certificate of purchase, and admissible in evidence to show a right to the property.

Appeal from Muscatine District Court.

Opinion by GREENE, J. This was an action of right commenced by William G. Woodward, against David R. Warfield, for land in Muscatine county. The answer denies plaintiff's title and right to possession. Judgment for plaintiff.

The defendant appealed, and now contends that the court erred in permitting the plaintiff to offer in evidence, the sheriff's deed from which he claimed to derive title. This deed purports to have been executed by the sheriff on the 22nd, February 1852, by virtue of a sale made on the 25th December, 1850, under an execution in favor of the state of Iowa, against John Holmes. It is objected that the deed was executed before the time of redemption had expired. This sale took place under the act of 1843; Rev. Statute, 628, and the amendatory act of 1846, 34. By virtue of this amendatory act of 1846, the execution defendant had a right to redeem the land sold, at any time within, twelve months from the date of sale; and if not redeemed by him within twelve months, it might be redeemed within three months thereafter, by any of his judgment creditors.

In either case, the act directs a certificate of redemption to be issued.

The deed in this case was executed by the sheriff, about fourteen months after the sale, and while the judgment creditors had a right to redeem, but after that right had expired in behalf of the defendant in execution. The second section of the act of 1846 directs: "When any real estate shall be sold on execution, under this act, the sheriff shall give to the purchaser, a certificate, showing the amount for which said real estate was sold, and that the purchaser will *be entitled to a deed* at the expiration of fifteen months from said sale, unless redeemed, as hereinafter provided; and the said purchaser shall not be required to have said certificate recorded."

As the deed in this case appears to have been *executed* before the expiration of the sale, it is contended that the sheriff, exceeded his powers, that the deed is consequently void, and should not have been admitted in evidence.

It will be observed that the section above quoted, merely directs what the certificate of sale should show, and among other things, it must show, "that the purchaser *will be entitled to a deed*," &c. It says nothing about the time when the deed must be executed. That is left entirely to the discretion of the sheriff. If more convenient for him to execute deeds one or three months in advance of the time of delivery, he was at perfect liberty to do so. There is no particular time designated for this duty, Rev. Stat., 633; § 10, and 638, § 28. It would seem that the deed might have been *executed* at any time after the sale, and be delivered to the purchaser, if entitled to it at the expiration of fifteen months. We take it for granted, that the deed was not delivered to the purchaser until he was entitled to it, as there is nothing of record in the case to show at what time the purchaser obtained the deed.

But if the deed had been delivered to him in advance of the fifteen months, it does not follow that it was void. It was equal to a certificate of purchase, and admissi-

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ble in evidence to show a right of possession, and nothing could avoid it, under a valid sale, but the certificate of redemption obtained by the execution defendant, within twelve months, or by one of his judgment creditors, within the fifteen months after the sale. As nothing of that kind was produced on the trial below, it is safe to assume that the land had not been redeemed, and that the deed was properly in possession of the purchaser. From the record before us it is clear that the court did not err in admitting the deed.

The form of the certificate of acknowledgment was objected to in the court below, but as the record in the case does not furnish us with a copy of the certificate or its substance, we cannot disturb the ruling below, in that respect.

Judgment affirmed.

Cloud and O'Connor, for appellant.

W. G. Woodward, pro se.

LOGAN v. TIBBOTT et al.

Where the plaintiff was permitted to file amendments to his petition, it is error to refuse leave to defendant to amend his answer. The Code favors amendments to pleadings.

Where four parties entered into a written agreement to go upon a joint adventure to California; and where about a month after, three of the same parties, with another, not a party to the original, make additional stipulations referring to and connected with the first agreement, and in reference to the same adventure, and on the same sheet of paper; held, that the two agreements should be regarded as one and the same contract.

In an action upon an agreement where each party had sustained damages by a failure of the other to perform, the defendant's right to damages may be set off against the plaintiff's, and it is error in the court to exclude evidence tending to prove defendant's right to damages.

Appeal from Marion District Court.

Opinion by HALL, J. Samuel Tibbott and William Tibbott brought suit by petition against W. H. Logan, the defendant below, upon a contract as follows:

"An article of agreement made this 15th day of March, 1850, between Samuel and William Tibbott, of Pleasant Grove township, Marion county, Iowa, of the first part, and Dorrit Shea and W. H. Logan, township, county and state aforesaid, of the second part. That the party of the first part, covenant and agree to fit out the party of the second part, for the gold regions of California; find them with clothing and provisions to said region, and also to find them in all necessaries while there, and pay one-half of their passage and expenses home for one half of the gold, the party of the second part dig or otherwise obtain, till the 25th day of December, 1851. It is understood

that the party of the second part, shall sustain half of the expenses of hauling their own provisions from market.

Signed and delivered,

DANIEL SHEA,

W. H. LOGAN,

Party of the second part.

In presence of TERRY TUTTLE.

SAMUEL TIBBOTT,

WILLIAM TIBBOTT,

Party of the first part."

On the other side of the same paper, is the following :

"Pleasant Grove, Marion County, April 22, 1850.

It is understood and agreed by and between the undersigned company now bound for the gold region of California, that they will deposit their amounts of digging together in company, and share the same equally when done digging, and also that if any one or more of the party or company should die here or there, shall share equally with the other or others in the amount dug in. December 29, 1851, and also if any should lose time by sickness, no deduction shall be made for the same, and this obligation to be in full force from the day we—the company—start from this place for the above mentioned gold region.

DANIEL SHEA,

W. H. LOGAN,

WM. TIBBOTT,

GEO. L. GRANT."

The original petition was filed August 27, 1853. On the 13th of September, 1853, the defendant filed his answer to the petition. On the 13th of September, two amended petitions were filed. The case was called for trial, as the record shows on the same day the amended petitions were filed, and after the jury were sworn, the plaintiff asked leave to amend the answer so as to meet the amended petition. This was refused by the court. One of the jurors being sick, they were discharged. The defendant renewed his motion to amend. The cour

refused, alleging as a reason that he had already decided the question. A new jury were empaneled, and thereupon on the trial, the plaintiff gave in evidence, the contract above dated, 15th of March, 1850, after plaintiff had closed his evidence, the defendant offered the contract written on the the other side of the paper, dated April 22, 1850, to which plaintiff objected, and the court ruled that it should not be given in evidence.

On the trial, evidence was given tending to prove that the plaintiff did not perform this part of the contract, but sold out the team on the Humboldt river, 700 miles before they arrived at the gold region, and abandoned the defendant, and that the outfit furnished by plaintiff was insufficient. The defendant attempted to prove the damages he sustained in consequence of such abandonment which the court ruled improper, and refused to admit. The court also instructed the jury :

“That though the outfit might not have been entirely sufficient to take the parties through to California, still, if the said outfit was of use and value to the defendant, plaintiff can recover for the same, deducting therefrom such amount of damage as defendant has shown he has sustained by reason of the plaintiff's failure and if such use and value exceeds such damage, then plaintiff will be entitled to a verdict for such excess ; and if such damages equal such use and value, then for the defendant.”

There were several other exceptions which we do not deem material.

The first question arises upon the refusal of the court to allow the defendant to amend his answer, after the plaintiff had filed two amendments to his petition.

It is possible the refusal of the court on the first application might have been justified, under the circumstances ; but after the jury had been discharged, and the defendant made the application to amend, it was the duty of the court to have allowed the amendment ; Code, §§ 1758 and 1759. To refuse amendments when the pleadings have been filed

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in the hurry and confusion of attendance at court, would often defeat the ends of justice, and the Code most evidently contemplates that they shall be permitted, under the exercise of a sound discretion by the court.

The second question arises upon the refusal of the court to allow the contract on the other side of the paper, on which the contract was written, to be given in evidence. In this, we think the court erred. Although it was not signed by one of the plaintiffs, it was evidently treated as a part of the transaction, and by one of the parties adopted. This belief is strengthened from the fact that they were both written upon the same paper, and the one of the 22d of April, refers to the one of the 15th of March; and more especially should this contract be treated as a part of the contract of March 15th, if there was any evidence tending to show that the plaintiffs were partners in the adventure.

The third question arises from the exclusion of the evidence offered by the defendant, tending to prove that he was damaged by being deserted on the Humboldt river, and the instructions given to the jury that they should deduct the damage defendant had sustained, by a failure of plaintiffs to comply with the contract, from the amount of benefit and use that the defendant had received from the outfit.

The inconsistency of these rulings is too apparent to be commented upon. The instruction recognizes a right to offset damages; the exclusion of the evidence denies him the right to prove the damages. The instruction allowing the damages to be set off is correct, but the exclusion of the evidence was error.

There is error, however, in the instruction. It assumes that if the plaintiffs partly performed their contract, in taking the defendant to the gold regions, that plaintiff could recover the contract share of his earnings, and the defendant could only set off the damages he sustained by the plaintiff's breach of contract. This is not law. The plaintiff must fulfil his obligation. The defendant abandoned, to find his way as best he could on the Humboldt river, 700

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miles from the place of destination, cannot be called upon to pay for the plaintiff's misfortunes or faults. The petition does not seek to recover for the use of the team and board and fare of the defendant; it avers a compliance with the contract on the part of the plaintiffs. They must stand or fall upon the truth of their allegation.

Judgment reversed.

J. E. Neal, for appellant.

G. G. Wright, for appellee.

BURTON v. EMERSON, SHIELDS & Co.

Where a purchaser, at a sheriff's sale, gives a receipt to the execution defendant in redemption of the land, according to the execution law in force at the date of the contract, and where such redemption payment and receipt are not denied by the purchaser, he is estopped from claiming title under that sale.

E., S. & Co. obtained judgment on a note dated December 20, 1842, on which *venditioni exponas* was issued April 8, 1846, and a levy and sale were made under the valuation law of 1843; held, that as the execution returned and the deed, showed that the sheriff exercised his powers and conducted the sale, exclusively under the valuation law after it had been repealed; and as the contract was made before that law took effect, the deed was *prima facie* void, and could impart no title.

The execution law in force at the time of a contract, enters into and becomes a part of the contract; and where such contract is enforced under execution sale, such sale should be conducted in harmony with the law of the contract, so as to leave the rights of parties unimpaired.

Appeal from Dubuque District Court.

Opinion by GREENE, J. Action of right, to recover lot three hundred and fifty, in the city of Dubuque. Petition

filed by John Burton, against James M. Emerson, John H. Emerson, and John G. Shields, claiming the right to the lot in fee simple.

The answer of defendants denies the averment of the petition, and alleges, in substance, that on October 28th, 1844, they purchased the lot at a sheriff's sale, by virtue of a writ of *fi ri facias*, issued from a judgment rendered in the district court of Dubuque county, at the November term, 1842, in favor of Thomas McCraney, for the sum of \$15 40, against John V. Berry ; that they paid for said lot the sum of forty dollars, and received from Geo. W. Cummings, as sheriff, a deed for the lots, which was filed for record, October 31, 1844.

The answer also alleges that the defendants, under the style of Emmerson, Shields and company, recovered a judgment in said court, against said Berry, for the sum of nineteen dollars, in May 1844 ; that on said judgment they sued out an execution upon which the land was levied, but the execution was returned for want of bidders ; that afterwards, April 8th, 1846, they sued out a writ of *venditioni exponas*, directed to said sheriff ; that on the day of sale the lot failed to bring two-thirds of its appraised value, and defendants then offered to take the property at two thirds valuation, say \$83.33, and they accordingly became the purchasers, and obtained a deed duly executed, and had the same recorded, May 23d, 1846.

To the answer, the plaintiff's reply admits the two executions and sales, and yet claims that plaintiff is the rightful owner of the lot, by virtue of a deed of conveyance, executed by John V. Berry, to him and his brother, Thomas Burton, for a full and valuable consideration, paid October 27th, 1845, and filed for record November 10th, 1845, and by virtue of a devise to him by said Thomas, who died before the commencement of this suit. The plaintiff's replication also alleges that the whole of the record in the execution sales shows that the defendants have no title by virtue of the sheriff sales.

By agreement, all the documents, records and deeds were to be used as evidence in the case. Upon these, under the state of pleadings above indicated, the court found for the defendants. According to the record before us, the lot was redeemed from the first execution sale, in accordance with the law in force at the date of the contract; as the money was receipted by the defendants, and the receipt and payment fully acknowledged, it follows that they acquiesced in Berry's redemption of the property; and by that act, under the law, are estopped from claiming title by virtue of their purchase under the McCraney judgment. That deed was, in effect, cancelled. The contract upon which the judgment was rendered, in favor of Emerson, Shields and company, was a note, dated December 29, 1842, being prior to the valuation law of 1843, and consequently that law was not applicable to this contract. This principle is settled by *Ruz v. Wood*, 3 McLean, 575; *McCracken v. Hayward*, 2 Howard, 813; *Kenzie v. Bronson*, 1 ib., 311; laws of 1844, 7. According to these authorities, and the statute in force at the date of the execution and sale of 1844, the execution law in force at the time the contract was made, entered into and became a part of the contract.

The statute of 1844 fully revived the execution laws repealed by the valuation law, "so far as they relate to judgments heretofore or hereafter obtained, on contracts made prior to that time;" and indeed, so far as those prior contracts were concerned, those execution laws had not been repealed; for, as they entered into, and became a part of the contracts, they were, in reference to them, as irrevocable as the express stipulations in those contracts. It follows, then, that the sheriff should have sold the lot under the execution law in harmony with that of 1842; and that he had no legal power to make the sale under the valuation law of 1843, in matters calculated to impair rights under the contract. In every particular, it appears that the proceedings of the sheriff under the *venditioni exponas*, was in accordance with the statute of 1843, and especially

in accordance with the third section of that act, which was most repugnant to the law which entered into and became a part of the contract.

On January 19th, 1846, an act was approved repealing the third and fourth sections of the act of 1843, and "so much of the ninth section as required the officer to notify in writing." This act took effect on the first day of April, 1846. The *venditioni exponas* was issued on the 8th day of April, after the repealing act took effect. Hence, the sheriff had not even the semblance of authority to sell the property under those repealed sections. They were not only repugnant to the law of the contract, but they were also completely abrogated, so that they could impart no power to the sheriff, in any case, unless they had become a part of the contract which he was directed to enforce and satisfy.

Under the act of April 1st, 1846, which was in harmony with the law of the contract, and in force at the date of the execution and sale, the sheriff was authorized to give the purchasers "a certificate, showing the amount for which said real estate was sold, and that the purchaser will be entitled to a deed at the expiration of fifteen months from said sale, unless redeemed," &c.

Instead of delivering a certificate as required, and waiting fifteen months for the delivery of the deed, the sheriff arrogated to himself the power to give the deed at once, which it appears was placed upon record within two months after the sale, and over thirteen months before the purchasers could have been entitled to it. Every act of the sheriff under the *venditioni exponas*, shows that he was acting under the repealed valuation law; indeed the deed itself shows that the sale was conducted exclusively under that law. It therefore pronounces its own condemnation.

The *venditioni exponas* in like manner shows upon its return, that the sheriff had exercised powers under an inoperative and defunct statute. Under a statute not only inoperative but which, when in force, could not have been

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enforced against the contract and judgment upon which it was issued.

We have repeatedly held, and would still decide that a *bona fide* purchaser, at a judicial sale, may repose with confidence upon a valid judgment, execution and deed. But in this case, two-thirds of the purchaser's platform is gone. Two of the three essential pillars to his title are without foundation, and powerless. They pronounce their own imbecility.

The record before us then establishes the fact, that at the time Burton purchased the property of Berry, it was subject to the judgment which Emerson, Shields & Co. held against Berry; that they subsequently undertook to enforce the judgment by a levy and sale of the property, but that the levy and sale, were *prima facie*, conducted without authority of law, and therefore imparted no title to the purchaser. It follows consequently that the title to the lot, is still in Burton, subject only to the antecedent judgment lien of Emerson, Shield's & Co., and that the court below erred in finding for the defendants.

Judgment reversed.

Smith, McKinlay, and Poor, for appellants.

Hempstead and Burt, for appellees.

EMERSON AND SHIELDS v. TOMLINSON.

A petition for rehearing should not be favored by the supreme court, unless applied for at the time the judgment was rendered.

After rights are vested, under a decision of the supreme court, no discretionary power can be exercised by that court to change or set aside such decision.

Appeal from Dubuque District Court.

Opinion by HALL, J. The record presents the following facts: The cause was regularly docketed for trial, at this court, on the 15th day of February, 1852. On the 27th day of February, 1852, the court rendered a final judgment affirming of the district court. This was at the February term of this court, 1852, held at Dubuque. On the 29th day of June, 1853, it being the June term at Iowa City, a petition for a rehearing was filed by the defendant; on the 16th day of July, of the same term, this petition was finally decided, and judgment given by the court overruling and refusing the rehearing.

At the December term, 1853, a motion in the nature of a petition for rehearing was written out on the motion book, and on the 6th day of February, 1854, a rehearing of the cause was adjudged by the court, and the cause continued to the next June term. At the June term, 1854, the cause was again argued, and by the court held under advisement to the present term.

We can arrive at no other conclusion, than that this rehearing ordered on the 6th of February, 1854, was inconsiderately made, and that this court had no power to make that order.

We have not come to this conclusion without great consideration. We have searched in vain for a precedent, and we can see nothing but mischief and subversion of established principles in the exercise of this power.

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There was no rule of court upon which to base these proceedings, but on the contrary, the rule has always required a petition for a rehearing to be filed at the term of the court where final judgment was given, unless it was otherwise arranged by the parties or their attorneys, and reduced to writing, or made a part of the record. At the December term of the court, 1853, the same term that this rehearing was granted, this court specially enforced this rule in the cases of *Cavender v. Smith*. In *Deeds v. Deeds*, 1 G. Greene, 396, this court denies the power of the district court to change a decree made at a previous term. The court says "the judgment is absolute," and cannot be changed, altered or reversed by any court except an appellate court, or upon application by bill or petition to the court which rendered the same, impeaching it for fraud, or showing the mental, moral or physical incapacity of the father to perform the duties of a guardian over his own offspring, happening *since* the decree."

Although there can be no appeal from the decisions of this court notwithstanding its decisions are final, and conclusive over the rights adjudicated, yet it is governed by law. Its powers and duties are limited by just and salutary restrictions. Its jurisdiction is guarded by great principles and fixed rules. This court has no *arbitrary discretion*. It cannot open a door in favor of a particular case, and close it to alter cases similarly situated. It has not an indefinite and continuous power to *rehear, alter, change and reverse* its own judgments and decisions. Parties cannot sleep upon their rights and allow a final judgment to stand from term to term, and from year to year, waiting for a change of the bench, or favorable time to renew a long settled and adjudicated cause of litigation. A judgment, however erroneous, made by this court is irreversible by law, and if final by the rules of the court, becomes a vested right in the party recovering it, and is as sacred in the eye of the law as any other right which he possesses. He has the highest assurance of the gov-

ernment in favor of his title, and he is secure. "The uncertainty of the law" no longer clouds his title or alarms his hopes of enjoyment.

The petition for a rehearing of a case after final judgment, is sanctioned by courts as a matter of caution. The court acknowledges its own fallibility, and allows its attention to be again called to the decision, and wisely listens to all suggestions of error. It is based upon a desire to avoid error, and is really a writ of favor, and not a right to the party. It is a part of the original hearing, for the cause is open until the time for further consideration and adjudication has passed. When the term is over and all parties have acquiesced, and no suggestion of error had been made, no rehearing prayed for, there is no power in the court to open up the judgment and renew the litigation. It is doubtful whether even consent under such circumstances would confer jurisdiction—whether litigation even if the parties do consent, should be perpetual.

Concede to this court, that it has a continuous and indefinite power over the judgments rendered by it, and what will be the result? The power conceded, and any party feeling aggrieved by a previous decision, can, by petition, call that power into action, if upon examination, the judgment, although it has been acquiesced in for years, will be opened for a rehearing; and, upon a hearing, if shown to be erroneous, it will be vacated and reversed, and all the rights settled by the original decision, will be amended. If the exercise of this power is safe for one year after final judgment, it is safe for ten years. If justice, is the paramount and exclusive object of the law, this rule might be tolerated; but the law regards the settlement of private rights and an *end of litigation, as a necessity*, and wisely provides that it is better that injustice should sometimes be done, than that litigation should never end.

The discretion of a court is always a legal discretion. It is limited by rules, and circumscribed by law. It is not the

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basis of power, but an attendant upon the exercise of power—regulating and modifying the application, but not changing or weakening the rule. Discretion is not a tyrant, acting upon mere will or favoritism. It is given to guard against the rigor of the law, and the accidents and mistakes of parties. It is charitable equity, that mingles with the administration of justice, and aids in the investigation that precedes the judgment. This discretion is never resorted to where a general rule applies; it is only where no general rule will answer the ends of justice—where from necessity some latitude is required in administering law, that this law called discretion is admitted or tolerated. The *power* to render or vacate judgments—to overthrow decisions and renew litigation—can never be derived from the law of *discretion*.

Petition dismissed.

Hempstead and *Burt*, for appellants.

Smith, McKinlay and *Poor*, for appellee.

KING v. HAMPTON.

An award is valid under an agreement to have it returned to a justice of the peace for judgment upon the award; although the district court is the more appropriate tribunal. Such an award may be pleaded in bar to an action upon the same subject matter.

Appeal from Linn District Court.

Opinion by GREENE, J. Cyrus King, commenced this suit against S. B. Hampton, to recover damages for a

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fraudulent sale of land. Defendant pleaded an arbitration and award in bar to the action. To this, plaintiff demurred, and the demurrer was overruled. It is objected that the court erred in this ruling, on the ground that the arbitration was not conducted in strict conformity to the Code; that the award should be returned to the district court, and not to a justice of the peace, as designated in the agreement. We think this provision in the agreement to arbitrate will not invalidate the award. It is still binding upon the parties and could be enforced under the Code. The fact that the parties agreed to have it returned to a justice's court, would not affect the right of the district court to control the proceedings, and enforce the award, Code, § 2115, even if a justice of the peace had no authority to render judgment upon the award. The parties in their agreement are to name the court by which judgment is to be rendered, Code § 2099. Nor are they limited in this selection to the district court, still that is doubtless, the more appropriate tribunal to render judgment upon an award.

Besides, we have no doubt the present award is good and could be enforced at common law; and as it comprises the subject matter for which redress is sought by plaintiff's petition, it was appropriately pleaded in bar to the action.

We conclude then, that the court did not err in overruling the demurrer.

Judgment affirmed.

I. M. Preston, for appellant.

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COOPER *et al.* v. FREDERICK.

Where a petition seeks a specific performance, and the settlement of a partnership business, it should set forth the amount of capital invested by each partner; the method of carrying on the business, and the leading facts and conditions upon which the partnership was formed, and under which plaintiff seeks to recover.

A decree should not give more or greater relief than is claimed in the petition.

Two of three joint tenants cannot agree upon a division of their land that will be binding upon the third.

A settlement of accounts between two partners cannot be binding upon the third partner, without his consent.

In making a final settlement between partners, and a division of the lands, the court should examine into all the circumstances, rights and equities of the respective partners, and arrange the settlement and division accordingly.

IN EQUITY. *Appeal from Polk District Court.*

Opinion by HALL, J. The petition of B. F. Frederick, in this cause, shows that on the 20th of April, 1846, a co-partnership was entered into, between the petitioner, John F. Frederick and Jacob Frederick. The objects and purpose of the partnership were to purchase and improve lands, and carry on a farming business. That the contract was reduced to writing on the 20th of November, 1847. That the firm purchased some twelve hundred acres of land, the title to which was taken in the name of Jacob Frederick; that large and valuable improvements were made upon a part of said lands, and some personal property was accumulated by the firm. That in April, 1849, John S. Fredrick withdrew from any further labor or attention to business of said firm, and went to California, without any settlement of his interest in said firm. The petitioner continued in the business of the firm until October 1, 1850, when all further action and business between said partners, were closed and discontinued by mutual consent of the petitioner and said Jacob

Frederick. That in June, 1850, about one hundred and ninety acres of the land were surveyed off from the partnership lands, and by a parole arrangement and agreement between Jacob Frederick and petitioner, were to be conveyed to the petitioner B. F. Frederick, by said Jacob Frederick. That in accordance with said agreement petitioner went into the possession of the lands and has since made large and valuable improvements thereon, that a final settlement was made of the personal property of the firm between petitioner, and Jacob, except the sum of fifty dollars for each year, which by the articles of partnership was to be allowed to petitioner. That they were unable to agree as to the division of the land, which remained unsettled. That on the 6th of May, 1852, Jacob Frederick departed this life. The petitioner makes the executors and heirs of Jacob Frederick, deceased, and John S. Frederick parties, and asks judgment for the amount due for labor, and asks a specific performance of the contract as regards the 190 acres set off to petitioner and a division of the partnership estate.

Several of the heirs were not personally served with process, but publication was made before the return term of the notice.

At the return term, a default was entered, and a decree *pro confesso*, taken and a specific performance decreed for the 190 acres of land, and one thousand eight hundred dollars in money, against the executors of the estate, to be levied generally from the assets of said estate.

The defendants appeal to this court. Several exceptions were taken to the manner of bringing the defendants into court, which it is unnecessary to decide.

This petition is very inartificially drawn up; indeed it is so defective that it is doubtful whether any decree could have been properly rendered upon it. It is almost barren of the main facts upon which the court must adjudicate in order to properly settle up the business of the partnership. The petition does not show the amount of the original capital invested, nor the interest of either partner, nor the

mode and manner of conducting the business, nor fix any basis by which the court can decree an account and settlement of the partnership property.

The decree of the court below appears to have gone further in error, and to have granted more than the petition would justify, and decreed a liability against the individual property of one partner, in order to give the petitioning partner, his share of the partnership assets.

If the articles of partnership provide for the division of the assets, they should be followed; and if they show the amount of capital originally invested by each partner, that should control; but in the absence of such provisions and evidence, it was absolutely necessary for the court to ascertain those facts, and the amount of the assets now remaining, and make a settlement that will give each party what he is entitled to receive. If the land is not susceptible of a just division, it should be sold and the proceeds divided.

In regard to the specific performance of the parol contract between Jacob and B. F. Frederick, that must be settled upon some principle not now prescribed. Jacob Frederick, so far as the petition discloses his power and interest, had no authority or right as against John S. Frederick, to agree to convey the land. He could not dispose of John S. Frederick's equitable interest. The decree of the court, so far as it divests John of his interest, goes beyond the petition, and is not authorized.

The settlement between Jacob and B. F. Frederick will not bind John S. Frederick. As far as we can see, the whole matter of the partnership remains unsettled. The 190 acres of land upon which B. S. Frederick has settled; and which were set off to him by Jacob, are still equitably and legally a part of the partnership assets, and must be treated as such. In making a final settlement and division of the property, the court will look into the peculiar circumstances, and if consistent with the rights of the parties, will protect B. F. Frederick in his rights, by allowing

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him for improvements and benefits which he has bestowed upon the land; and if the land is partitioned amongst the partners, the court may allow him to retain this specific tract as a portion of his share.

Decree reversed.

Bates and Parish, for appellant.

Geo. G. Wright for appellee.

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BEEBE v. BROWN et al.

In an action upon a special contract, evidence of a contract, materially different from that upon which suit is brought, may be excluded.

Appeal from Potomac District Court.

Opinion by HALL, J. This was a suit brought by Isaac Beebe, against the defendants, Mary Brown and Adalino Perry, for a mechanic's lien. The petition sets out two contracts. By one, the plaintiff agreed to do certain work in repairing a house for the sum of forty dollars to be paid by defendants. The other contract was to build an addition to the first mentioned house, for which defendants agreed to pay one hundred and eighty-five dollars.

The answer of the defendant denied all the allegations in the petition, and sets up new matter in defense.

On the trial in the court below, the plaintiff proved that he made the repairs upon the house, and that in making them, he was at work by the day; that he worked twenty days in making the repairs, and that his services were worth two dollars per day; and that they agreed to pay him two dollars per day for the work. He also proved

that he contracted to build the addition to the house for one hundred and seventy-five dollars, and that he had completed the contract; that during the progress of the work, the defendants had so changed the plan that he had to make two additional doors, which he made at the request of defendants; and that the doors were worth ten dollars.

The court below excluded the evidence on the ground of variance between the proof and the allegations in the petition.

Exceptions were taken by the plaintiff, and the ruling of the court below in excluding the evidence, is now assigned for error.

We are not disposed to encourage technical objections in the trial of causes, but we must act upon some general rule that will be safe and just to apply to all causes.

The contract in the one case, is alleged to have been for forty dollars, the proof was two dollars a day.

In the other case, the contract was for one hundred and eighty-five dollars; the proof is for one hundred and seventy-five dollars. Does the evidence prove the contract?

In *Suller v. Richardson*, 3 Mon., 203, it is decided that when a bond is sued upon, payable in three months, and the declaration says nothing about interest, and the bond produced on the trial is for interest, the variance is substantial. In *Palmer v. McGinnis*, Hardin's Ky., 530, it is decided that when a bond is misdescribed in a declaration, the defendant may plead *non est factum*, and on the trial take advantage of the variance; that he is not bound to crave oyer.

In *Sebastian v. Tompkins*, 1 Marshall, 63, it is held that proof without allegations will not authorize a recovery any more than allegations without proof.

Bunuel v. Twinter, 5 Conn. R., 273, and *Shepperd v. Palmer*, 6 Conn. R., 95, where a party declares upon a special contract, it is held that he must prove it, as it is laid in his complaint.

Beebe v. Brown.

A variance between an averment and proof is fatal, 1 Ham., O., 504.

The contract must be correctly and truly stated in the pleadings, and proved as laid. *Lawrence v. Ruies*, 10 John's, 140.

A variance between the description of a note, and the one produced in evidence is fatal. *Breeze*, 286.

A substantial variance between an agreement set forth in the pleadings and the one proven, is fatal. *Mulford v. Bowen*, 4 Halst., 315.

A variance between the declaration and the agreement offered in evidence as to the sum due, is fatal. *Rogers v. Estis*, 2 Litt. Select Cases. *Adams v. Brown*, 4 Litt., 7; *Osborn v. Fulton*, 1 Black., 233; *Mulford v. Young*, 6 Ham, O., 294; *Beecher v. Chester*, 2 Root, 90.

The authorities cited in the petition, for rehearing in this case, do not meet the question; counsel appears to have lost sight of the pleadings. Had the party declared for work and labor, &c., and claimed a much larger sum than was really due, the doctrine of variance would not have harmed them. The contract could have been introduced to fix and control the price alone. But having declared upon a special contract, the proof must prove the contract as laid. Any material variance will be fatal.

Judgment affirmed.

C. E. Stone, for appellant.

Clarks and Starr, for appellees.

Sears v. Tubbs.

SEARS v. TUBBS.

On appeal from a justice of the peace, it is error to render judgment against the defendant, unless the transcript or some paper on file in the case, shows the amount and nature of plaintiff's demand.

A petition is not necessary before a justice of the peace; but if the suit is upon a note or account, it should be filed with the justice.

The transcript from a justice of the peace, should contain a brief statement of the plaintiff's demand.

Appeal from Jackson District Court.

Opinion by GREENE, J. Suit commenced before a justice of the peace, by S. D. Tubbs, against D. Sears. Plaintiff recovered judgment. Defendant appealed, and judgment was rendered against him in the district court.

It is objected that the judgment of the district court is erroneous; because there is no paper on file in the case, and no statement in the transcript of the justice showing the nature and amount of plaintiff's demand. This objection appears to be well founded. There is nothing in the case to show the plaintiff's cause of action; nothing to show whether it is a note or an account; nothing even to show whether the action is in form *ex contractu* or *ex delicto*. Although a petition is not necessary, before a justice, still, if the suit is upon a note or an account, it should be filed with the justice, to show the nature and amount of the plaintiff's demand. The docket and transcript of the justice should also contain a brief statement of such demand; Code, § 2269.

As there is nothing in the record to show what matter was adjudicated, the judgment in this case could not be pleaded in bar to any other action. Should the plaintiff

 Bennett v. Nye.

commence another suit on the same cause of action, a record so general, vague and uncertain as this, could not preclude his recovery.

Judgment reversed.

Smith, McKinlay, and Poor, for appellant.

J. B. Booth, for appellee.

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BENNETT v. NYE.

A parole contract to deliver hogs at a future day may be valid under the statute of frauds, as qualified by § 2411 of the Code.

The facts which will bring a parole contract within § 2411, may exist and be established outside of the stipulation in such contracts.

Appeal from Muscatine District Court.

Opinion by HALL, J. Joseph Bennett brought this suit against Alfred Nye, upon a contract by which Nye sold and agreed to deliver to Bennett, twenty-nine fat hogs, averaging three hundred pounds each in weight. The petition alleges a breach, &c. The answer denies the contract and damages.

On the trial the plaintiff offered to prove a parole contract, and the court decided that the contract could only be proved by written evidence. Judgment was rendered for the defendant.

The only question presented, arises upon a construction of the statute of frauds. The Code, § 2410, requires contracts "in relation to the sale of personal property, when no part of the property is delivered, and no part of the price paid, to be in writing." § 2411 qualifies

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that part of § 2110, by saying, that "it does not apply when the article of personal property sold is not, at the time of the contract owned by the vendor, and ready for delivery; but labor, skill, or money, are necessary to be expended in producing or procuring the same."

The fact which removes a parole contract from the operation of the statute of frauds, under this contract, can well exist outside of the contract. The party should have been permitted to prove his contract, and the facts which would take it out of the statute. If the plaintiff could prove, that at the time the contract was made, the logs were not owned by the defendant—not ready for delivery—that labor, skill, or money, would necessarily have to be expended before they could be produced or delivered, then he would have taken the case out of the statute.

Judgment reversed.

J. Butler, for appellant.

D. C. Cloud, for appellee.

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CLARE v. CLARE.

Where the February term of the court was commenced under an act in force at the time; and where a new act took effect on the third day of the term, changing the time of holding the court; held, that a decree rendered at that term of court, after the new act took effect, is valid.

Error to Marion District Court.

Opinion by GREENE, J. This was a proceeding for divorce, and alimony, tried at the February term of the Marion district court. It is objected that the decree was rendered after the term of court, and is therefore void.

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It appears that the term was commenced on the first Monday, the 7th day of February, by authority of law then in force, giving one week to Marion county. On the third day of the term, February 9, 1853, an act took effect fixing the time of holding court in Marion county, on the second Mondays of April and September. As this act took effect on the 9th of February, it is claimed that the term of court under the old law could not continue after that day, and as the decree was rendered February 10, it was from and after the time expired.

We cannot consider this view tenable. The February term was authorized by the old law. It was commenced while that law was in full force, and the court was held at least two days before the new law took effect. The new law affected no change or abatement of any term commenced under the old law. A term legally commenced could be continued to its close in the absence of any law to the contrary. The new law did not repeal the old; it only changed the time of holding court. It could produce no such change till after it took effect. This change did not interfere with or encroach upon the term previously commenced. It only authorized other terms to be held in April and September of that year.

We do not deem the authority, relied on by appellant's counsel as applicable. It is true that decisions, made after the last day of a term, or on a day when the same court is appointed by law to be held in another county, are *coram non judice*. But the present decision was not so made.

* * Judgment affirmed.

S. W. Summers, for appellant.

Slagle and Achesson, for appellee.

LAWSON v. CAMPBELL AND BROTHER.

The court will not presume a state of facts, which would make the following charge to the jury erroneous: "That if the enclosures of the defendant were not protected by a good and sufficient fence, such as would protect his crops from stock not breachy, that he could not be allowed his damages."

Every fair presumption should be in favor of the decision below, and therefore facts should not be presumed that would indicate error.

In an action to recover the value of an elk killed by defendant, and where he set up in defense that the elk was trespassing upon his enclosure, and had introduced evidence to show the value of the elk; held, that the plaintiff should be permitted to give rebutting evidence in reference to the trespass and the value of the elk.

Appeal from Polk District Court.

Opinion by HALL, J. This action was originally commenced by Campbell and brother, against Jacob M. Lawson before a justice of the peace, to recover the value of an Elk, said to be reclaimed by plaintiffs, which the defendant had killed. The defendant set up in defense that the Elk was trespassing upon his enclosure when killed, and that the plaintiffs had a drove of Elk, which had invaded his fields and trespassed upon his grain-fields and did great damage to the defendant and sets up this damage by way of set-off to plaintiff's demand.

The court below instructed the jury, in substance, "That if the enclosures of the defendant were not protected by a good and sufficient fence, such as would protect his crops from stock not breachy: that he could not be allowed his damages."

The Code, § 913; provides, that "if the beasts, were lawfully on the adjoining land, and escaped therefrom in

consequence of the neglect of the person, suffering the damage, to maintain his part of the division fence, the owner of the beasts, shall not be liable for such damage."

Without extending this opinion or examining the question, as to lawful fences and trespassing animals generally; we can well conceive of a case where the instructions of the court would find complete shelter from error, under the law above referred to, and in as much as the evidence upon which the instructions were given, is not set out, we cannot say but such a case was presented by the evidence. This court cannot presume any set of facts, to base error upon. Every fair presumption, should be in favor of the decision below. *Dunham v. Benedict*, 1 G. Greene, 74; *Mackemer v. Binner*, ib., 157; *Saum, v. Jones County*, ib., 155.

There is another point insisted upon by the plaintiffs in error. After the defendant below, had given evidence as to the value of the Elk, the plaintiffs was permitted to give further evidence by way of rebutter, and fixing the value of the elk.

This court has repeatedly decided that the admission of such evidence was proper, and in the case of *Wright v. Millerd*, the judgment of the court below was reversed, on the ground that the court refused to admit evidence in rebutter, which went to establish the main fact of the cause of action.

The action was trespass, *quare clausum fregit*, and the question in issue was the possession of the plaintiffs. In giving evidence in chief, the plaintiff substantially proved his possession. The defendant then introduced several witnesses, who proved defendant in possession, and not plaintiff. In reply, plaintiff offered further evidence of his possession, which the district court refused to admit, and exceptions were taken. This court reversed the judgments, ruling that such restricting evidence was proper. That the plaintiff, when he has made out his case by competent evidence, might properly rest, and that he was not

Campbell v. Thompson.

bound to give more evidence than would prove his case in the first instance.

Judgment affirmed.

G. G. Wright and J. E. Jewett, for appellant.

Bates and Finch for appellee.

CAMPBELL v. THOMPSON *et al.*

After granting a change of venue to another county, the district court has no longer jurisdiction over the case, and is not authorized to render judgment against the defendant.

Appeal from Marion District Court.

Opinion by GREENE, J. This suit was commenced in December, 1853, in Marion county, by Thompson and Weldon, against Campbell. The original notice was served upon Thompson, in Jefferson county. In January, 1854, the defendant applied for and obtained a change of venue to Jefferson county. Plaintiffs subsequently filed their petition with the clerk of the Marion district court, and at the April term of that court, judgment was rendered against the defendant, by default, for the \$500, notwithstanding the change of venue which had been granted in the case. This proceeding was clearly erroneous. After granting the change of venue, the district court of Marion county had no farther jurisdiction over the subject matter or the parties. The defendant was no longer called upon to

Keeney v. Chilis.

appear in that court to make defense, and therefore the decision was wholly unauthorized.

Judgment reversed.

Charles Negus, for appellant.

J. E. Neal, for appellee.

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KEENEY v. CHILIS.

Possession of a bond negotiable under the Code, is *prima facie* evidence of ownership; and if such possession is alleged to be fraudulent, the fact can only be established by evidence.

After a deposition is returned to court, the objection cannot for the first time be raised, that the questions were leading.

Appeal from Polk District Court.

Opinion by HALL, J. Henry Chilis brought his suit against Charles Keeney, upon a note, drawn by defendant to plaintiff, for one hundred dollars. The defendant set up fraud, &c., and states that the note was given by him for a certain bond, executed by defendant and one Walker, to one Hayworth. That plaintiff had the bond in his possession, and fraudulently delivered it to defendant, &c. The court, in effect, charged the jury that Chilis' possession of the bond was *prima facie* evidence of ownership, and of his right to dispose of it; and that if the defendant denied his right, he must establish the fact of the fraudulent possession, by evidence.

The plaintiff below, also took the deposition of one Smith, a non-resident witness, which was duly returned to the clerk of Polk county district court. Defendant below excepted to the deposition principally on the ground that

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the questions propounded to the witness were leading. The court overruled the objection.

The instructions of the court are good. The bond was negotiable under our Code, and the title passed by delivery.

Objections to questions as leading in a deposition, come too late, after the deposition is returned into court. They should be made when the deposition is taken.

Decree affirmed.

Bates and Finch, for appellant.

G. G. Wright, for appellee.

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ELLSWORTH *et al.* v. HENSHALL.

Where a store-house and the goods therein were in possession of the sheriff, by virtue of a writ of attachment; and where the attachment defendant instituted an action of replevin, and in the writ and petition described the property as being "a certain storehouse, warehouse, and the goods therein contained, being the store in Council Bluffs, known and designated as the store of your petitioner;" held that the description was sufficiently certain.

If a store containing the goods to be replevied, is so described as to designate it from all other stores in the place, it is sufficient.

It is error to overrule an application for a change of venue, merely on the ground that it was not sworn to by the party himself. Such application may be sworn to by the attorney of the party applying, or by any other person.

Appeal from Potawatonic District Court.

Opinion by GREENE, J. An action of replevin by Thomas Henshall against Egbert Ellsworth, sheriff, and T.

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G. Stewart. The writ and petition describe the property replevied as being: "a certain store house—ware house—and the goods therein contained, being the store in Council Bluffs, in said state and county, and known and designated as the store of your petitioner," &c. A motion made to quash the writ, and a demurrer to the petition, on the ground of defective and uncertain description, were overruled. It is now urged that the court erred in thus deciding the description of property to be sufficiently certain. If the store house is so described as to enable the sheriff or coroner to identify it from other store houses in the place, it is sufficient. It is referred to as the store of the petitioner, and it being the only store the petitioner had in the place, it could not be mistaken for another. Besides, it appears by the petition that the very store and goods, referred to were in possession of the sheriff by virtue of an attachment, thus rendering the identity more certain. The store being sufficiently identified, there could be no mistake about the goods for the description embraced all the goods within the store. This we consider sufficiently specific. It furnished an unmistakable guide to the officer, who shows by his returns that he had no difficulty in finding the property described. As the petition and writ contained such a description of the property as enabled the officers to distinguish it from all other property of a like nature, we think the motion to quash, and the demurrer were correctly overruled.

2. The final refusal of the court to grant a change of venue, is also urged as error. It appears, that a motion for a change of venue was first granted, and on a rehearing was overruled. The application for the change, was, it seems, sworn to by the attorney, and not by the party himself, and it was for this reason refused. The Code provides, that a change of venue may be had "when either party files an affidavit" &c. An affidavit is necessary; but it does not follow that the party himself must make the affidavit. Certain facts must be sworn to; may not those

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facts be as well proved by the affidavit of an attorney, or any other disinterested witness, as by the party himself? It is not because the party himself swears, that the change is called for, but because certain prejudices or influences exist which might preclude an impartial trial. An attorney or third party, might understand those prejudices and influences, better than the party himself, and if so, his affidavit should be more satisfactory. Besides, if by construction, we should require such affidavits to be filed exclusively by the party himself, it would exclude non-resident and absent, sick and incompetent parties from the right of having the venue changed. We therefore conclude that the court erred in overruling the application.

Order reversed.

C. E. Stone, for appellants.

Clarke and Starr, for appellee.

Wright v. LeClaire.

WRIGHT *et al.* v. LECLAIRE.

In an action for the specific performance of the conditions of a title bond where the facts set forth in the petition would take the case out of the statute of limitations, that statute cannot be successfully pleaded, unless such averments in the petition are denied by an accompanying answer; and in such case, the issue of facts presented by the denials in the answer, should be tried.

Where a title bond stipulated not only that the land should be paid for, but also that the obligee should pay the "costs and charges" of the conveyance; and where the price of the land had been paid, such "costs and charges" should also be proffered and a deed demanded before a right of action accrued.

A title bond for land cannot be barred under the fourth section of the act of 1843, for the limitation of actions.

Appeal from Scott District Court.

Opinion by HALL, J. This is a bill in chancery, exhibited by Mary G. Wright, the widow, and John A. Gano and others, heirs at law of John A. Gano, sen., deceased, against Antoine LeClaire, for the specific performance of a contract

The petition sets out a contract, in the form of a title bond, executed by LeClaire to the decedant, on the 14th day of December, 1840. The bond is in the penal sum of one thousand dollars, and sets out a condition as follows:

"*Whereas*, The above bound Antoine LeClaire hath sold to the said John A. Gano, two certain lots or tracts of land, situate in LeClaire's second addition to the town of Davenport, Iowa Territory, known, designated and numbered on the plat of said addition, as out lots number twenty five and twenty six, for the consideration and upon the condition following, to wit: For the sum of five hundred dollars, twenty-five dollars thereof in hand paid; one

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hundred and fifty dollars on the first of June, 1841, and the balance thereof in two equal installments, to be paid in twelve and eighteen months from this date, as appears from three several promissory notes, of said John A. Gano, bearing even date herewith. Now the condition of the above obligation is such that if the above bounden Antoine LeClaire, on the payment to him of the aforesaid sums of money, at the time above limited therefor, does, and shall, at the cost and charges of the said John A. Gano, convey by good and sufficient warranty deed, the fee simple title to the said two out lots, to said John A. Gano, or to his assigns, then this obligation to be void ; otherwise to be and remain in full force and virtue.

ANTOINE LECCLAIRE.

Witness ANDREW F. RUSSELL.

The petition avers that no further payment was made upon the contract until June, 1844, when LeClaire, by suit at law, collected from Gano the amount due on the notes given for the land.

That about the first of July, 1844, John A. Gano departed this life, leaving Mary G. Wright, his widow, and the other complainants, his heirs ; that said heirs were all minors at the death of said Gano, and the oldest of his children did not arrive at the age of majority until 1849, and several of them are still minors.

The petition alleges that at the time the contract was entered into, said John A. Gano was a non-resident of the then territory of Iowa, and has never resided within the territory or state ; that said widow and heirs have continued to reside in the state of Ohio from the death of said Gano, and never came within the state of Iowa until a short time previous to the commencement of this suit.

The petition avers that owing to the infancy and situation of said widow and heirs, they never ascertained or were informed of the existence of this contract, until a short time before the suit was brought ; that soon after they discovered the fact, they demanded a deed of said LeClaire, and offered

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to pay all expenses, &c., which he refused. The petition prays for a specific performance of the obligation, &c.

To this petition the defendant interposed a plea of the statute of limitations, approved February 15th, 1843. The plea is based upon the fourth section of that act. This section provides, "That every action of debt, covenant for rent, or arrearages of rent, founded upon any lease, under lease, or every action on account founded upon a single or penal bill, promissory note or writing obligatory, for the direct payment of money or the delivery of property, or the performance of covenants, or upon any award under the hands and seals of arbitrators, for the payment of money only, and every action of assumpsit shall be commenced within six years after the cause of action shall have accrued, and not after."

The plea is supported by an answer in which the non-residence of Gano is admitted; but as to his death and the condition of plaintiffs, the defendant only discloses belief, and denies inferentially, but does not deny as of his own knowledge. The contract is admitted, and the payment of the consideration money is also admitted, and new matter set up, showing that the consideration money was in part made by the sale of the lots sold by him to Gano.

There was a demurrer filed to the plea, which the court below sustained, and dismissed the petition.

This plea has been treated in the argument, as a mixed plea. If it is so, the court erred in dismissing the bill, for there was an issue of fact between the complainant and respondent which it was absolutely necessary for the defendant to make, to support the plea. The circumstances set forth in the petition, to take the case out of the statute of limitations, must be denied by the owner, or the plea could not be allowed. Then it was the duty of the court, even if the plea was allowed, to retain the cause, and try the questions of fact, which alone supported the plea.

But should this plea be allowed? Is it in fact any defense to the relief prayed for in the petition? This might per-

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haps, be answered without giving any construction to the statute, by simply ascertaining when a cause of action at law, upon the penalty of the bond, accrued to Gano, or his heirs. We think not, until the expenses of executing the deed, were proffered and a demand was made by Gano, or his heirs, and a reasonable time had elapsed after the demand.

Powers v. Brooks, 1 G. Greene, 236; *Wood v. Goodrich*, 9 Wend., 68; *Shuts v. Andrews*, 2 Black., 274. There does not appear to have been any demand made, until recently, and from aught that appears, LeClaire could have resisted the forfeiture of the penalty of the bond until this recent demand was made, on the ground that the expense of the deed had not been proffered, and a proper demand made. Under this view the statute could only apply to his covenants to convey the lots; here again the same dilemma arises. Gano, had no action at law, against LeClaire, either in covenant or debt, until he had made the demand of the deed. But, six years have past since the payment of the money by Gano, and there has been no demand of the deed, and still it is claimed that he is bound by the statute, from maintaining his action by failing to have an action. The act pleaded in this case did not take effect until the 4th of July, 1843—act of February, 15th 1843, Rev. Stat. 377, § 1,—and did not commence running until after the death of Gano. If the heirs of Gano, were minors and out of the territory as set forth in the petition, then they are completely saved by the 7th, and 8th sections of the act of limitation of 1843. Rev. Stat. 386.

The answer in this case, is to the whole merits of the petition, and therefore overrules the plea. To be allowed, the answer should have been confined to those facts alone which went to support the plea.

The answer, does not in fact, support the plea, for the main facts relied upon, to excuse the petitioners for the laches are not positively denied.

The authorities cited in this cause, by the counsel, we

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think prove that the 4th section of the act, does not apply to these kind of cases. That equity, acting by analogy to the law, should give the subject and object of the suit, its true purpose, and follow the law of real estate.

The capital circumstance of the contract, was the land. Gano contracted for the land, and LeClaire, agreed to convey land, and not to pay money. Both parties considered the sale of the land to be the main portion of the contract. When Gano paid the money and LeClaire received it, it was for the land and not for money to be returned at a future day. It was a contract affecting the realty, and was such an interest as our laws recognized as real property, and could be seized and sold on execution; was subject to a judgment lien, and the widows dower, and courts of equity treat it as real estate. LeClair, shows in his answer, that he treated it as the real estate of Gano. He levied upon, and sold it under execution.

Decree dismissing the petition reversed, and cause remanded, with instructions to the court below, to disallow the plea.

Decree reversed.

Jeffingswell and Dow, for appellants.

Jas. Grant, for appellee.

DEAN et al. v. HALL.

In an action upon an injunction bond, extraneous matter in reference to the injunction proceedings, and which are not of record in the case, and were not considered by the court below, will not be entertained by the supreme court.

Where objections were not raised in the district court, they will not be favored in the supreme court.

Appeal from Poweshiek District Court.

Opinion by GREENE, J. Debt on an injunction bond by E. and E. Hall, against J. S. Dean and I. J. Cole. Verdict and judgment for the plaintiffs.

Several errors are assigned and objections urged to the proceedings. We are called upon to review the matters upon which the injunction was issued and dissolved. We are urged to decide that the court erred in rendering the judgment, on the ground that it appears by the record of a certain chancery suit, that E. and E. Hall had sustained no damage under the writ of injunction, for the reason that it only restrained them from building a dam over the Des Moines river, a navigable stream; that the Halls had no authority for building such dam; that any one as agent of the public had a right to enjoin them, and that the injunction should have been dissolved.

But these objections are all *extraneous* to the present case. They do not appear to have been submitted to the court below; no exceptions were taken, and they are in no way made a part of the record. As there appears to have been no exceptions taken to any opinion of the court, or of any matter occurring during the trial, as the verdict of the jury was returned and the judgment thereon rendered without objection, we cannot for any reason urged in relation to the injunction suit, disturb the present action of debt upon the bond.

Webster v. Raver.

In *Doolittle v. Shelton*, 1 G. Greene, 271, this court decided that no original matter, not connected with the proceedings, nor acted upon by the court below, will be considered. So in *Powell v. Spaulding*, 3 G. Greene, it was held that the superior court can only renew and correct those proceedings which have been passed upon by the court below. And in *Parker v. Cockayne*, 3 G. Greene, 111, it was decided that objections not raised in the district court, will not be favored in the supreme court.

Under these decisions, it follows that the judgment in this case cannot be disturbed.

Judgment affirmed.

J. E. Jewett, for appellants.

W. Penn Clarke, for appellee.

...
WEBSTER et al. v. RAVEN.

In an action upon an attachment bond, it is error in the court to refuse instructions asked in reference to damages, when such instructions were in strict accordance with the Code.

Where a correct instruction is asked and refused, it is calculated to mislead the jury, although the substance of the instruction is given in a different form.

Appeal from Jones District Court.

Opinion by HALL, J. Hamilton Raver, the appellee, brought his suit in the district court of Scott county upon

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an attachment bond, executed by the appellants, William Webster and others, to appellee, on the 2d day of March, 1854, in the penal sum of four hundred dollars. Venue changed to Jones county. Judgment for plaintiff.

Upon the trial, the defendant below asked the court to instruct the jury: "That if said attachment was only wrongfully sued out, the plaintiff can only recover such damages as he may have proved to the jury he has sustained, and not exemplary damages." This instruction was refused by the court, and exceptions were taken by defendant. The court after this refusal, instructed the jury: "That they were the judges alone of the amount of damages and that exemplary damages were to be given only as they were satisfied that the attachment was willfully sued out."

The refusal of the court below to give the instruction prayed for by the defendant, is clearly error. The Code, § 1854, provides: That "in actions, on attachment bond, the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and if willfully wrong, he may recover exemplary damages."

• The giving of the instruction in a different form will not aid the defendant, 11 Ala., 535; 16 Ala., 720. It is error for a court to refuse a proper instruction, even though the same may be given in a different form.

The tendency of refusing correct and relevant instructions cannot be otherwise than to confuse and mislead a jury, and bring just contempt upon the administration of justice in our courts.

The instruction prayed for by the defendant below, strictly accords with the Code. The one given by the court rather fritters away the point, and only saves itself from absolute error by a proviso at the conclusion. Taking the refusal to give one instruction, and the giving of the other instructions together, the action of the court neutralizes itself, and renders the question doubtful, which

if left without any instruction, would have been more readily solved.

Judgment reversed.

Poor and Henry, for appellants.

I. M. Preston, for appellee.

BAKER *et al.* v. CHAMBLES.

School districts are corporations, and have the power to make contracts, &c., in relation to school houses; hence a note given by "the undersigned directors of school district, No." &c., and signed by three persons; held, that they were only liable as directors, and that it was error to admit the note as evidence of an individual liability against the makers.

Where the name of the principal and the relation of the agent he stated in a note or contract, and the agent is authorized to make such note or contract, the principal alone is bound, unless the intention is clearly expressed to bind the agent personally.

A party to a contract should be personally bound, unless his agency is disclosed; but in deciding whether the *apparent* agent or his principal should be bound, the presumption is that such agent intended to bind his principal.

Appeal from Muscatine District Court.

Opinion by GREENE, J. Action commenced by appellee, against appellants, to recover judgment against them on a note of which the following is a copy:

"\$62 87. On or before the first day of December, next, we the undersigned, directors of school district, No. 4, Montpelier township, promise to pay Benjamin Chambles,

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the sum of sixty-two dollars and eighty-seven cents, for value received this 22nd, day of November, 1851.

G. W. BAKER.

V. F. NICHOLSON.

SOLOMON LOVELL."

Defendants objected to the introduction of this note on the ground that it was made by them as directors of the school district, and not as individuals. The objection was overruled, and under the instructions of the court, judgment was rendered against the defendants for the amount of the note.

The only question now to be decided is, are the defendants personally liable on this note. In support of the decision below, it is claimed, they had no authority to execute the note as directors. By the Code, § 1108, each school district, is made a body corporate, with power to hold property, and be a party to suits and contracts. The name used in the body of the above note, is the style authorized by the Code. Section 1142, provides, that the "district board shall make all contracts, purchases, payments, sales" &c., in relation to school houses. This clearly confers upon the board of directors full authority to make any contract, or to execute a note in consummation of such contract, for any of the objects stipulated in the section. School districts are corporations possessing the power to make contracts. The district boards are made the agents of the districts, with power to make contracts. It matters not, whether those contracts are by parole, or in writing. If the directors had made a parole promise, in the name of the district, to pay for work or repairs on a school house, it could hardly be contended that such promise would make the directors liable as individuals; or that the district would be released. How can it change the liability of the parties, if that promise is reduced to writing? They still promise as directors, in the name, and in behalf of the district.

The relation of principal and agent is clearly shown

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upon the face of this note. They, as directors, as agents, promise in the name of their corporate district as principal.

The rule is well settled that if the name of the principal and the relation of agency be stated in the writing, and the agent is authorized to make the contract or obligation, the principal alone is bound, unless the intention is clearly expressed to bind the agent personally. *Stanton v. Camp*, 4 Barb., 275, 277; *Dyer v. Birnham*, 25 Maine, 10, 13; *Bradlee v. Boston Glass Company*, 16 Pick., 347, 350; *Key v. Purnham*, 6 Har. and John., 418, 421.

It is true, as claimed by counsel, that in deciding whether a party contracts personally, or as agent, the presumption is in favor of the former. It is obvious that a party should be personally bound, unless his agency is disclosed. But it is equally true in deciding whether an apparent agent intends to bind himself or his principal, the presumption is that he intended to bind his principal, because the agent should not be personally bound, unless that intention is expressed in the contract. 1 Am. Leading Cases, 603, 604.

In the note before us the agency is clearly expressed. The intention to bind the principal, and the principal only, is manifest. They do not promise personally; they promise only as directors of the district; we therefore conclude that the court below erred in admitting the note as evidence to hold the makers personally liable.

Judgment reversed.

William G. Woodward, for appellants.

Oloud and O'Connor, for appelle.

Atwater v. Woodward.

ATWATER v. WOODWARD.

Where there is good reason for believing that a full and true transcript has not been sent up from a justice of the peace, and where application was made within a reasonable time for a rule to perfect the record, it error to refuse such record.

Appeal from Marshall District Court.

Opinion by HALL, J. This case was an appeal from the judgment of a justice of the peace, to the district court of Marshall county. Mahlon Woodward, as plaintiff below, recovered judgment against DeWitt C. Atwater, from which Atwater appealed. The appeal bond was filed, but the justice in returning his transcript to the district court, did not return any allowance of the appeal, or certify the approval of the appeal bond. The defendant below filed in the district court an affidavit, showing conclusively that the appeal was taken and allowed by the justice, within twenty days after the rendition of the judgment, and that the appeal bond was approved, and prayed for a rule upon the justice, to perfect his returns. At the same time, the plaintiff below moved the court to dismiss the appeal. The court below refused the rule upon the justice, and sustained the motion of plaintiff, and dismissed the appeal, to which exceptions were taken.

We cannot but think that the court below erred in not allowing the correction of the transcript, or in not making the correction itself, especially as the rule was applied for within a reasonable time. There is every evidence of good faith on the part of the appellant, in taking this appeal, and the evident omission of the justice in making his return,

 Nuckols v. Mitchell.

should not subject him to such consequences. §§ 2338, 2339 of the Code, apply to this case, and clearly define the duty of the court upon this question.

Judgment reversed, with directions to the court to allow the rule upon the justice, to correct the return, and proceed to try the cause *de novo*.

Judgment reversed.

J. D. Templin, for appellant.

W. H. Seavers, for appellee.

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NUCKOLS v. MITCHELL.

Where it appears that the original notice and attachment were issued at the same time, it will be considered that the attachment was served out at the commencement of the suit, and it is error to dismiss the attachment in such a case, on the assumed ground that it was served out before suit was commenced.

Appeal from Potomac District Court.

Opinion by GREENE, J. Action on a promissory note, commenced by S. Nuckols. Attachment proceedings commenced simultaneously with the suit. On motion, the writ of attachment was dismissed, on the ground that the clerk had no authority to issue the writ until after the suit was commenced.

It appears that the original notice and the writ of attachment were issued and returned at the same time. As the notice and writ bear the same date, we take it for granted that the action and the attachment commenced their progress together. Under the Code, § 1846, property may be attached at the commencement or during the progress of the

proceedings. The writ in this case was issued at the commencement of the action, and therefore comes within the requirements of the Code. The court erred in sustaining the motion on the grounds stated.

Judgment reversed.

C. E. Stone, for appellant.

Starr and Clarke, for appellee.

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STEAMBOAT GLOBE v. KURTZ.

The Des Moines River is a navigable stream and a public highway, consequently a steamboat may lawfully navigate the same; and although a ferry may be legally established upon that river, it must be so conducted as to avoid obstructing its navigation. The right to navigate the river is paramount to a ferry franchise, and therefore a steamboat is not required to wait for a ferryman to lower his cable, so as to run any risk or suffer any damage from the delay.

A ferry cable extending across a navigable stream should be so managed as not to be an obstruction to navigation, and so as to cause neither inconvenience or damage to boats.

Appeal from Wapello District Court.

Opinion by HALL, J. Peter Kurtz, brought a suit in the district court of Wapello county, against the steamboat Globe. He alleges in his petition, that on the 18th of May, 1854, he was the owner of a ferry across the Des Moines river, at the town of Chilweather in said county; that he had a license from the county judge to keep said ferry. That the ferry was worked with a cable stretched across the river; that he had the usual fixtures and appliances for lowering the cable, to allow the free passage of

Steamboat Globe v. Kurtz.

boats : "that whilst he was conducting his business, the said steamer Globe, without warning or notice of her approach, and without giving a reasonable time for lowering said cable, run upon and over the same, and the officers and crew cut and destroyed the same, so as to render it of little or no value," &c.

To this petition, there was a demurrer filed by the boat, which was overruled by the court and exceptions taken. An answer was then filed in which it is admitted, that the plaintiff had a ferry and cable, but denies that he had the necessary fixtures and appliances to lower the cable readily and without creating unreasonable delay to boats in passing said ferry—denies that the boat approached without warning or notice, and without giving reasonable time for lowering the cable ; admits running over the cable, and cutting the same, but claims that it was only done upon the failure of plaintiff to lower his cable, as he should have done, to enable the boat to pass. That no more damage was done than was necessary to enable the boat to pass in safety.

The replication is these words : "And plaintiff for replication says the petition is true, and he will maintain the same, anything in the answer contained to the contrary notwithstanding."

On the trial, the court at the request of plaintiff, instructed the jury as follows : "That if the jury believe the plaintiff was in the lawful possession and use of the ferry in petition named ; and that the steamer Globe injured the same, the plaintiff is entitled to recover such damages as he has shown to have suffered from such injury, if they also find from the evidence that the plaintiff used reasonable efforts to lower his rope, so that said steamboat Globe could pass with reasonable chances of safety, and that she did not on her part, afford the plaintiff a reasonable opportunity to do so."

The following instructions were presented by the defendant below, and refused by the court : "That the plaintiff

was not entitled to any notice to lower his cable, but must always be in readiness to lower the same, and must lower the same so that boats may pass without any delay.

"That the right to establish a ferry across the said river, does not authorize the charter owner to place any obstruction in said river, nor to do anything else but use the privilege of having and manning a boat or boats across said river."

The defendant below, excepted to the giving and refusing to give these instructions by the court below. There was a verdict and judgment for plaintiff, and the defendant appealed to this court, and with other matters assigns the ruling of the court upon these instructions for error.

The Des Moines river is a navigable stream and a public highway, and the steamboat Globe was lawfully navigating the same. The ferry was established by legal authority. The question presented is, whether the ferry had any authority to obstruct the navigation of the river. The court below, by its charge to the jury, assumes that a boat must notify the ferry owner of his approach, and when the boat has arrived at the point where the cable is stretched across the river, she must wait for the cable to be removed, if the delay is not unreasonable, and can be done "*with reasonable chance of safety*" to the boat. That the charter for the ferry authorizes the proprietor to put an obstruction in the river.

The navigation of the river and the rights of ferry owners are both important rights, and some rule should be adopted to fairly protect both interests, without damage to either. The highway of the river is paramount and must prevail when the mode of constructing a ferry encroaches upon its free navigation. The boat about to pass the ferry was not bound to wait as long as she could do so with a reasonable chance of safety. She was not to run any risk or suffer any damages from the delay. She is not required to suffer the consequences of chance or hazard. We can well conceive of a state of facts where

a steamboat, while navigating the channel of a narrow and rapid stream, could not stop without more or less danger of being forced by the current, upon the shore, or out of the channel, and in this manner suffer great damage and delay. The interest involved in steamboats and their cargoes, cannot be subjected to so narrow a rule. All that is required of the conductors of boats in relation to these *quasi* authorized obstructions, is to act in good faith. They cannot totally disregard the rights of the ferry owners. They make the boat liable for wanton and willful injuries done. In extending to the ferry owner the usual courtesy that is due from man to man, in giving him an opportunity to remove his cable, they are not to wait to estimate the chances of the safety of the boat. They are not called upon to decide how long the boat can delay with "*reasonable chance of safety*." The interest is too great on the one side and too small on the other, for such a rule. The ferry cable must not be an obstruction to the navigation, and must be so kept that no well meaning man who respects the rights of others, can have good cause to complain at the mode and manner of its removal when the boat is about to pass. "The term *nuisance*, signifies anything that causes *loss, inconvenience, annoyance or damage*." 3 Petersdorf's Com. Law, 550. If the thing complained of, causes neither of these, it is no nuisance. But if it causes either in the *least degree*, the person complained of must be held answerable, no matter how small the damage may be. *Cooper v. Hall*, 5 Ohio, 191. It cannot be contended that the Code, authorizing the county judge to license *ferries, &c.*, can be so construed as to authorize a *nuisance* in our navigable rivers. No such authority is granted, and if ferry owners see proper to stretch a cable across the river, they must see that it causes neither inconvenience, annoyance or damages to boats that navigate the river.

The lawful navigation of the river can never be a nuisance to a ferry owner, but a ferry may be a nuisance

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by obstructing the navigation. Where the ferry owner is protected in the enjoyment of his franchise and property pertaining to the ferry, against wanton and willful injury from those who are engaged in navigating the river, where he has received the usual courtesies that are extended between man and man, he has no cause to complain. His interest is at best but a servient right, and cannot be extended beyond the naked object of his license. He is allowed to keep a ferry, not to obstruct the navigation or place a nuisance in the river.

Judgment reversed.

H. B. Hendershott, for appellant.

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HOUSTON v. THE STATE.

Where it appeared that E. Kamberling was a witness before the grand jury, although the name indorsed on the indictment was "E. Kimberling," he was properly admitted as a witness on the trial.

On an indictment for marking and defacing a school house, the court instructed the jury that, "The state had proved all that was necessary in reference to the school district;" held, that this was charging the jury on the facts, and therefore erroneous.

Error to Cedar District Court.

Opinion by GREENE, J. Indictment for defacing and marking a school house. Verdict and judgment against defendant.

1. It was objected that one E. Kamberling was permitted to testify on the trial, when the name indorsed on the indictment is E. Kimberling. The witness having sworn that he was the identical person sworn before the grand jury, the court admitted his testimony. In this we think

the court acted discretely. There is but a trifling distinction in the names—a difference of but one letter; and especially when such difference so nearly leaves the name *idem sonan*, it would not justify the exclusion of the witness. If doubt was entertained, the resemblance at least justified the court in receiving proof of identity.

2. The court instructed the jury that the state had proved all that was necessary with reference to the school district. It is justly objected that this is an instruction upon the facts in the case. This is error. This was charging the jury upon the weight and sufficiency of testimony. It is not within the province of a judge to instruct a jury as to what facts are proved or not proved. He may explain to them the legal effect of facts, but the facts themselves are to be ascertained exclusively by the jury. Better abolish the right of trial by jury at once, than to permit judges to dictate the facts upon which the verdict must be found. The practice of charging the jury upon the facts may have precedent in some of the older states; but in Iowa it has ever been regarded as dangerous—as a usurpation of power, and as an interference with the rights of parties, and the province of jurors; *Wood v. Mains*, 1 G. Greene, 275; *Frederick v. Gaston*, *ib.*, 401. The Code, § 1791, provides that “the charge of the court shall be confined strictly to matters of law.” The court below must have overlooked this provision of the Code, in charging the jury in the present case.

Judgment reversed.

Jas. Grant, for appellant.

D. C. Cloud, for the state.

ULMER et al. v. HIATT et al.

In order to object to the jurisdiction of the court, either over the person or the subject matter, a special appearance may be made, but if the appearance is for any other purpose, it will be considered general.

An application for a continuance, is an appearance, and waives defects in the service of process.

Appeal from Muscatine District Court.

Opinion by HALL, J. The appellees brought their suit against the appellants upon an account, and on a special contract. The notice was returned by the sheriff without service. At the term of the court to which suit was brought, the defendants below appeared and made application to continue the cause for want of notice. During the term, a default was taken against the defendants for want of an answer. The defendants then filed their motion to open up the default. This motion is not sustained by any affidavit. The motion was overruled and judgment given for want of an answer.

The only question presented, which we deem material, is, whether the defendants below made an appearance in the case, that would authorize the court to take jurisdiction of the persons of the defendants.

The rule adopted by this court, appears to be this, that a defendant may so far appear, as to object to the jurisdiction of the court, either over the person or subject matter of the suit, but if the party appearing by motion or otherwise, seeks to call into action any power of the court except such as pertain to its jurisdiction, it is an appearance. To appear and apply for a continuance, clearly admits a cause

Bosworth v. Farrenholtz.

of action and a party. It concedes a cause over which the court has power to act. It amounts to a general appearance and waives defects in the service of process.

Judgment reversed.

Cloud and *O'Connor*, for appellants.

S. Whicher, for appellees.

BOSWORTH *et al.* v. FARRINHOLTZ.

The remedy for forcible entry or detention of real property, not allowable by the Code, where the defendant sets up a paramount title under the third division of § 2362; nor when a question of title is involved.

Appeal from Scott District Court.

Opinion by GREENE, J. This was an action for forcible entry and detainer, commenced by Bosworth and Allen, against Anna B. Farrenholtz, under the third division of section 2362 of the Code. The action was commenced before a justice of the peace, where the defendant pleaded title paramount to plaintiffs' title. Plaintiffs demurred to the plea. The justice of the peace overruled the demurrer and dismissed the case, on the ground that justices of the peace have no jurisdiction where questions of title are involved. The cause was taken to the district court, where the same demurrer was urged, and decided in the same way.

The correctness of this decision cannot be seriously questioned. The Code expressly provides that: "The question of title cannot be investigated in this form of action," § 2371.

Clark v. Blackwell.

In this case, the answer denies all the allegations in the petition, and claims that the defendant is in possession of said premises in her own right; that she has title thereto, and that her title is paramount to the plaintiffs'. The third division of section 2362, recognizes such a defense. If the defendant claims by a title paramount to the lien under which the sale was made, or by title derived from the purchaser at such sale, then this summary remedy is not allowable. The answer is in strict conformity to the Code. It alleges two sufficient reasons in avoidance of plaintiffs' action.

1. She claims by a paramount title, which precludes the action for the forcible entry or detention of property.

2. She tenders an issue of title which cannot be investigated in this action. It follows, therefore, that plaintiffs' demurrer to defendant's answer was correctly overruled.

Judgment affirmed.

A. Corbin, for appellants.

Whittaker and Grant, for appellee.

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CLARK v. BLACKWELL.

A special appearance should only be allowed to urge jurisdictional objections.

Appeal from Johnson District Court.

Opinion by HALL, J. This was a suit commenced by Jacob Y. Blackwell against Phillip Clark, by attachment in the district court of Johnson county, upon a lost nego-

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tiable note. The defendant appeared and moved to suppress depositions, and also to make a motion to quash the attachment. The appearances were claimed to be special. No answer was filed, and a judgment was rendered by *nihil dicit*, against the defendant.

In the case of *Ulmer, et al v. Hiatt, et al*, ^(a) decided at this term of the court, we have laid down the proper rule. No special appearance can be made except to jurisdictional questions. If a party so far appears as to call into action the powers of the court, for any purpose except to decide upon its own jurisdiction, it is a full appearance. Under this rule, the defendant made a general appearance to the action in the court below, and suffered judgment to pass against him without objection or defense. The defendant tacitly confessed the judgment, and cannot now assign errors against that which he voluntarily refused to object to in the court below.

Judgment affirmed.

J. D. Templin, for appellant.

Wm. Penn Clarke, and *W. G. Woodward*, for appellee.

(a) *Ante*, 439.

MOSS et al. v. HUMPHREY.

Where goods were attached in the hands of an assignee, and where under an issue joined, the facts were found, " That the defendant in making an assignment for the benefit of his creditors, had kept back a portion of his property, and all of his choses in action ; " held, that the assignment was fraudulent and void, and could not protect the property from attachment.

If, after an assignment for the benefit of creditors, the property of the assignor is attached in the hands of the assignee, and if the pleadings involve the question as to the validity of such assignment, and if the facts found, show the assignment to be fraudulent, it may be declared by the court as invalid and of no effect against the attachment.

Where the investigation and facts found on a trial, are responsive to the pleadings, the finding of the court in reference to those facts will be considered appropriate, and may justify a court in declaring an assignment to be of no effect against an attachment.

Appeal from Muscatine District Court.

Opinion by GREENE, J. At the commencement of this suit, an attachment was issued in favor of Isaac M. Moss and brother, against James A. Humphrey. Before the action was commenced, Humphrey had made an assignment to D. C. Cloud. The attachment was levied upon the goods in his hands, and upon him as garnishee. In the court below the assignment was disregarded, the attachment sustained, and judgment rendered against the defendant, and the assignee as garnishee. It is now claimed by the defendant that the proceedings below were erroneous, for the reason that the plaintiffs could not attach the property, after it had been assigned for the benefit of all defendant's creditors.

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Under the pleadings, the validity of the assignment was put directly in issue, and submitted to the court without a jury. The court found the defendant indebted to the plaintiffs in the sum of \$699 39, "and do further find that the assignment heretofore made by defendant, was, and is fraudulent and void, as to the plaintiffs," &c. Here the court found the facts which constitute a fraudulent assignment, and decided that the legal effect of such fraudulent assignment was to render it invalid, as to the plaintiffs' attachment. It appears by the bill of exceptions, that the "defendant had kept back a portion of his property, not exempt from execution, and all of his choses in action." It cannot be doubted that such facts, designing a wrong so flagrant upon creditors, show a partial and fraudulent assignment, and such as should not protect the property in the hands of the assignee from attachment. And still, under these facts, it is contended that the court erred in deciding that the plaintiffs' being creditors of the assignor, were not bound by said assignment, and that the assignor took no title to the property which had been thus assigned. It is insisted that the assignment is general, and for the benefit of all the creditors of the assignor, and is in strict compliance with the Code.

No objection is made to the form of the assignment. The assignor was doubtless politic enough to have an assignment prepared that would be *prima facie* conformable to law. Notwithstanding these formal regularities, the record before us is an illustration of the fact, that the reality is not always disclosed by the form; that the external shape is not always a sure test of the internal condition. In this case, the assignment purports to be for the general benefit of creditors; while the facts show that it was made for the especial benefit of the assignor, at the expense of the creditors.

The investigation and the facts disclosed were responsive to the issue joined under the pleadings; consequently the finding and decision of the court were intrinsic and

Danemuller v. Burton.

appropriate, and the facts found under the issue fully justified the court in deciding the assignment to be invalid and of no effect against the attachment.

Judgment affirmed.

Cloud and O'Connor, for appellants.

Jacob Butler, for appellee.

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DANEMULLER v. BURTON.

The fourth section of the statute of limitation of 1843, cannot be pleaded in bar to an action founded upon a judgment rendered before a justice of the peace in this state.

The certified transcript of a justice of the peace is made by law as conclusive in the courts of this state, for certain purposes, as the transcript of a court of record, and for that reason the fifth section of the statute of limitations would seem appropriate to actions founded upon transcripts from justices' courts.

In *Brace v. Luck*, ante 143, the question is not decided whether an action founded upon a justice's transcript from another state is within the fourth section of the limitation law of 1843.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This action was founded upon the transcript and judgment of a justice of the peace, of Dubuque county, by which it appeared that judgment had been rendered against Geo. Danemuller, as garnishee, in June, 1853. The defendant pleaded the statute of limitation of 1843. To this plea, the plaintiff demurred, and the demurrer was sustained, and judgment was rendered in favor of plaintiff.

This decision directly involves the question, whether the fourth section of the "act for the limitation of actions," approved February 15th, 1843, can be pleaded in bar to an action founded upon a judgment rendered before a justice of the peace. That section provides that all actions founded upon "lease for rent," or "on account," or "founded upon any single or penal bill, promissory note, or writing obligatory, or for the direct payment of money, or the delivery of property, or the performance of covenants, or upon any award under the hands and seals of arbitrators for the payment of money only, and every action of assumpsit must be commenced within six years." Rev. Stat. 385, § 4. There is nothing said in this section about actions founded exclusively upon a transcript of a judgment from a justice of the peace. Among the causes of action mentioned, that which comes nearest to such a judgment, is, "any award under the hands and seals of arbitrators." But there is a wide difference between an award of arbitrators and a judgment of a justice, or any other judgment upon which execution might be issued.

The fifth section of said act, of 1843, provides: "That judgment in any court of record in this state, may be revived by *scire facias*, or an action of debt may be brought thereon within twenty years next after the date of such judgment and not after." True, a justice's court is not "a court of record," in the ordinary acceptation of that term; still the docket and certified transcript of a justice, under the Rev. Stat. have all the credit and force of a record. Upon the filing of a certified transcript, in the district court of the same county, a like judgment is rendered in that court, and thereupon becomes a lien upon the defendant's real estate, Rev. Stat. 328; §§ 15, 16. By section seventeen, such certified transcript is conclusive evidence of the judgment before any other justice of the peace in the state, and will justify a *scire facias*, and an execution, unless full payment or other good cause can be shown. In other sections of the justice's act, regulating appeals, &c., full credit

and conclusiveness are attached to a justice's docket and transcript. Indeed, so much importance and conclusiveness are given to them as matters of record, that we can see no good reason why the judgment of a justice of the peace in this state may not with reason, be included in section five. That section is at least much more appropriate to such a judgment, than section four.

This court decided in *Latourette v. Cook*, ^(a) that this fourth section of the statute of limitations cannot be pleaded in bar to an action of debt, founded on a judgment from another state. Upon the same principle, it cannot be pleaded in bar to an action founded upon a judgment from a justice of the peace in this state.

But, counsel for the appellant places great reliance upon the case of *Brnce et al v. Luck*. ^(b) In that case, the suit was brought on the transcript of a judgment rendered on a promissory note, by a justice of the peace, in the state of Missouri, in 1844. The defendant pleaded the statute of limitations, of 1843. But unlike this case, the plaintiff did not demur to the plea. He virtually confessed the plea, and sought to avoid it by alleging in his replication that the plaintiffs were non-residents of the state, and that therefore their right of action should not be barred. The defendant's demurrer to the replication was sustained, and this court affirmed that ruling, upon the ground that the *lex fori* must prevail in all matters merely remedial, and that consequently the non-residence of the plaintiff could not avoid such a plea. Under that state of the pleadings, we were not called upon to decide whether an action on a justice's transcript from another state, in connection with the promissory note, could or could not be barred by the statute of limitations of 1843. That question was not presented by the record, and therefore was not decided. But in this case, that question is directly involved, and accord

(a) See 3 *G. Greene*, 593.

(b) *Ante*, 143.

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ingly decided, that an action founded upon a judgment rendered by a justice of the peace, is not within the fourth section statute of limitations of 1843.

Judgment affirmed.

J. Burt, for appellant.

Smith, McKinlay and Poor, for appellee.

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LEMP v. HASTINGS *et al.*

The case of *Arment v. Humphrey*, 3 G. Greene, 255, approved as applicable to the Code.

L. resided in school district number one, and had his store doing business in school district number two; held that school district number one could not impose a tax upon the merchandize in said store.

Where a principle has been recognized by the supreme court, it should not be overruled unless it is palpably wrong, or has been changed by legislative enactment.

Where personal property has no established locality, and is not used in doing business in a county or district in which the owner does not reside, then such personal property is to be assessed and taxed as directed by § 460 of the Code. But if such property has a known locality, and is used in doing business at such locality, it should be listed and taxed in the county or school district where it is thus used.

Appeal from Muscatine District Court.

Opinion by GREENE, J. The petition in this case was filed by John Lemp, by which it appears that he resided in school district No. 1, in the city of Muscatine, and that he transacted his business as a merchant, in school district No. 2, in said city; that in 1853, he had in said district No. 2, personal property amounting to over twelve thousand dollars, on which the officers of said school district No. 1, had assessed a tax of six mills per cent.; and that

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district No. 2, had for the same year assessed a tax of three-mills per cent. on the same property; that the collectors of both districts were requiring payment from him; that he did not know to which of the districts payment could be legally made. The petition prays that Charles P. Hastings, as collector of school district No. 1, and that Abial Fry, as collector of school district No. 2, be made parties, and asks that both of them may be restrained from collecting, until the right may be determined. Both respondents in their answers, admit the allegations in the petition, but Hastings as collector of district No. 1, alleges that Lemp is the head of a family having children, and living in said district No. 1, and that he is a merchant, having his store and merchandise and business transactions in district No. 2, and that the tax levied on his property is legally assessed. Fry's answer admits the facts averred in plaintiff's petition and in Hastings's answer, but insists that the collector of district No. 2, is legally entitled to the tax on said merchandise. The court below found that the merchandise taxed, was in school district No. 2; that the owner thereof had his domicile in school district No. 1, and that district No. 2 could not tax said merchandise to pay taxes voted therein.

This decision of the court below is claimed to be erroneous, and we think with good reason. We have already had a case before us, from the same locality, involving the same question. In *Ament v. Humphrey*,^(a) it was decided, as Ament resided in school district No. 1, and had his store in school district No. 2, that his personal property in school district No. 2, was not liable to be assessed for school tax in district No. 1. If the principle, established by that case, has not been changed by legislation since 1850, it follows that the rule adopted in that case should govern in this. When a rule or principle of law has been fully recognized by the supreme court, it should

(a) 3 G. Greene, 255.

not be overruled, unless it is palpably wrong or has been changed by legislative enactment.

In reference to the principles involved in this case, there has been no such change; on the contrary, the Code adopts the same rule in reference to counties. Section 463, provides that when a person is doing business in more than one county, the property and credits are to be listed and taxed in that county where they exist. Under section 460, this rule is some what different. It provides that "all personal property is to be listed, assessed and taxed in the county where the owner resides," &c., on the 1st of March of that year. This section no doubt influenced the decision of this case in the court below. But we think the personal property contemplated in this section, is not applicable to goods, wares and merchandise kept in an established store as the basis of a local business. This distinction is recognized by § 463. If a party has most of his capital invested in an established store in Muscatine county, whence he derives his profits and income, and resides in Scott county, it could hardly be regarded as a fair construction of the above sections to say that his property and credit existing in Muscatine, should yield their revenue to Scott. That county in which his business is established, and which furnishes the protection, security and profits to his property, should derive its appropriate revenue therefrom. Such should be the policy of revenue laws, and such we believe to be the spirit and intention of the Code.

In this opinion, we are especially confirmed, where the conflict arises between two school districts, as in this case. The tax is only authorized by a vote of the qualified electors of the district; and such electors of a district at a legally authorized meeting shall have power, "To lay such tax on the *taxable property of the district*, as the meeting shall deem sufficient," &c., Code § 115, ¶ 5. The power to lay such a tax, is confined to the electors of a

district and to the property of that district. They have no power to lay a tax upon property in another district.

The course to be adopted under the Code, in reference to personal property may be thus defined. Where the personal property has no established locality, and is not used in doing business in a county or district in which the owner does not reside, then such personal property, is to be listed and assessed as directed by § 460 of the Code. But if such property has a known locality, and is used in doing business at such locality, it must be listed and taxed in the county or school district, wherein it is thus used.

We conclude then, that the court below erred in deciding that Lemp's merchandise located and used in doing business in school district No. 2, was subject to a school house tax, by a vote of the electors of district No. 1, in which he had his domicile.

Judgment reversed.

Cloud and O'Connor, for appellant.

W. G. Woodward, and *S. Whicher*, for appellees.

Parker v. Pierce.

PARKER v. PIERCE.

Instructions given or refused by the court below, are no part of the record unless made so by a bill of exceptions; nor will this court disturb the action of the court below, unless it appears that exception was taken to the ruling of the court, in reference to such instructions.

This court will not entertain errors which do not appear of record.

Appeal from Polk District Court.

Opinion by GREENE, J. This action was commenced by Taylor Pierce, against Samuel R. Parker. Verdict and judgment for the plaintiff.

The defendant appealed, and claims that the court erred in refusing to give certain instructions which were requested in his behalf.

In reference to these instructions, the transcript from the court below, is, in the extreme, vague and uncertain. It does not show by whom the instructions were asked, nor that any exceptions were taken to the ruling of the court in reference to them. The instructions are not embodied in a bill of exceptions, and consequently are not made a part of the record. The rule has been often announced, that this court will not entertain errors which do not appear of record. 1 G. Greene, 74; 157, 165, 301.

The practice is equally well settled, that unless exception was taken at the time to the ruling of the court below, in giving or refusing instructions, this court will not disturb such ruling.

The imperfect and uncertain condition of the transcript in this case, shows the importance of strictly observing those rules.

Gano v. Gilruth.

As the errors assigned, do not designate any error of record in this case, the judgment cannot be disturbed.

Judgment affirmed.

Wm. Penn Clarke, for appellant.

J. E. Jewett, for appellee.

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GANO v. GILRUTH.

A court of equity has jurisdiction in a proceeding for dower where an account is prayed.

In Iowa, where dower attaches to legal and equitable interests in land, there would seem to be good reason why courts of law and equity should exercise concurrent jurisdiction in dower cases.

The common law rule that a demurrer reaches back to the first defective pleading, is not applicable to pleadings under the Code.

The fact that the defendant was a *bona fide* innocent purchaser, without notice, is not allowable as a defense to an action of dower.

Appeal from Scott District Court.

Opinion by GREENE, J. Petition filed by Catharine M. Gano, against James Gilruth, for right of dower in a lot in the the city of Davenport. To this petition the defendant answered that he was a *bona fide* purchaser of said lot without notice of plaintiff's right. Plaintiff's demurrer to this answer was sustained by the court, on the ground that it reached back to the first defective pleading, and accordingly the court dismissed the petition for want of equity.

The petition presents a *prima facie* case for dower; and in praying an account, an adjustment of her third of back

rents and profits, it shows good reason for going into chancery. In this state, where the widow is entitled to dower in land to which her husband acquired an interest, either at law or in equity, there would seem to be good reason why our courts of law and of equity should have concurrent jurisdiction in cases of dower. But chancery powers may especially be invoked in a case like the present. The petition presented a strong *prima facie* case for dower, and an adjustment on account, hence we are not able to discover any reason for the interference of the court, in dismissing the petition for want of equity.

The court below, in its administration of the common law, appears to have lost sight of the Code and its requirements in reference to pleadings. True, at common law the demurrer reaches back to the first defective pleading; but this rule cannot be consistently observed under our Code, in which "Demurrers for formal defects are abolished. Those for substantial defects must set forth the true grounds of objection to the pleadings demurred to;" § 1754. "Upon the determination of any demurrer, the failing party may amend or plead over," &c.; § 1755. The liberal policy of our Code, in allowing amendments and supplemental pleadings, cannot be very well observed if the plaintiffs' are to be so uncereemoniously pushed out of court, at the caprice of the court. By the record in this case, it appears that the defendant had interposed no objection to the petition. If it was defective, it furnished good ground of demurrer, in which the defect should be set forth, so as to give the failing party an opportunity to amend.

But in the petition before us, we discover no such defect. The court therefore erred in deciding that pleading to be defective. The court also erred, under the Code, in jumping over defendant's answer, and in arraying plaintiff's demurrer against his own petition. And again, the court erred in dismissing the petition. But in reference to the defendant's answer, the court expresses the "opinion that the plea is not a bar to the plaintiff's action." If the court

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had stopped there, and had sustained the demurrer for that cause, we should have indorsed his opinion. Ordinarily an innocent purchaser occupies strong ground; but that defense is not available in an action of dower.

Judgment reversed.

Smith and Corbin, for appellant.

Whitaker and Grant, for appellees

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CORIELL v. HAM.

A sheriff sold several lots, on execution, to C., the brother and agent of the execution defendant, who failed to pay the purchase money; the sheriff thereupon "proclaimed the postponement of the sale" from the 17th to the 24th of August, at which time the property was sold to H.; held, that as the adjournment was proclaimed by the sheriff, as the defendant's agent was present and had notice of the adjournment, and as it was occasioned by him, the sale was not void in consequence of such postponement; held, also, that although H. was present at the first sale, and had notice of the adjournment, it does not follow that he could be charged with notice of irregularities.

The execution law in force at the time of a contract, enters into and becomes a part of that contract, so far as its obligations and liabilities are concerned; but such portions of an execution law, as are merely remedial, do not affect such obligations, and may be changed or modified by subsequent legislation.

The substantial rights of parties, under a contract, cannot be changed or impaired by subsequent laws; but the method of enforcing those rights may be changed.

Where the judgment was rendered in 1842, and the execution issued and the sale took place in 1844; held, that the sheriff's deed delivered to the purchaser on the day of sale, did not invalidate the sale, nor impair the execution defendant's right to redeem the land under the law of the contract.

It is the policy of the law to protect judicial sales.

Coriell v. Ham.

Appeal from Dubuque District Court.

Opinion by GREENE, J. The petition in this case, was filed by Charlotte Coriell, and W. W. Coriell, against Matthias Ham, and prays that the execution sale be set aside and the sheriff's deed to certain lots in the city of Dubuque be cancelled. It appears that November 16, 1842, J. V. Berry obtained judgment against W. W. Coriell; that execution was issued June 27, 1844, and the lots in question were levied upon, and advertised to be sold on the 17th of August following; that the lots were bid off by John C. Coriell, the brother and agent of defendant, who failed to pay the amount of his bid, and in consequence, the sale was postponed until the 24th of that month, when M. Ham, became the purchaser.

The case as submitted to the court below, was decided against the plaintiffs, and their petition was dismissed. To this decision, several objections are urged by counsel for appellants.

1. It is objected that the sheriff was not authorized to make the sale on the 24th of August, as he had previously advertised the sale for the 17th of that month. It appears by the deposition of the sheriff, that he "proclaimed the postponement of the sale." The sale then was *postponed* from the 17th to the 24th of the month. As the adjournment was proclaimed by the sheriff, and as the execution defendant's agent was present, and had notice of it; and as the postponement was occasioned by his failure to pay the amount he had bid upon the property, he should not after so long an interval, be permitted to take advantage of that derangement in the sale. If there had been no postponement of the sale, and if the delay had not been occasioned by the agent of the execution defendant, we should regard this irregularity as having a more serious effect upon the validity of the sale. There is great propriety and frequently obvious necessity for adjourning such sales from time to

time; and when it is done by public proclamation and with notice to the parties in interest, as in this case, it should not have the effect to invalidate the sale.

In *Burd v. Damsdale*, 2 Binn., 80, it was held, that a sheriff's sale of lands, even after the return day of the writ of *venditioni exponas*, is not void, if advertised before, and continued by adjournment. So in *Luther v. McMichael*, 6 Humph., 298.

The case of *Givan v. Doe*, 5 Blackf., 260, is referred to by appellant, with great confidence. In some particulars, that case resembles this, but in others it is vastly different. In that case, a sheriff sold the land to B. who failed to pay the purchase money. Three days after, *at the request of C.*, and *without having adjourned the sale*, and without advertising it again, the sheriff re-exposed the property to sale, and sold it to C. *who had notice of the fact, and was a party to the irregularities*; and it was held that there were in the circumstances of the case, *those ingredients of fraud which vitiate the sale*. We have italicised the facts, and peculiar features of that case, which show it to be materially different from this. In this case there was an adjournment. The sale was not at the request of the purchaser, and he was in no way a party to the irregularities. Nor were there in this case, any ingredients of fraud which could invalidate the sale.

2. It is not pretended that there was fraud or collusion on the part of the purchaser, but it is objected to the decision below, that he had notice of the irregularities. Indeed, the plaintiffs show so much confidence in Ham, that they made him their witness, and it seems by his testimony, that he was present at the first sale, and from that circumstance, it is claimed that he had notice of the irregularity. By this same testimony, it seems that Ham had given Coriell "six years to redeem in, and had requested him to redeem at ten per cent. interest on the money he had paid out; that Coriell had refused to do so, saying

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that he could do better with his money." This testimony shows that Ham attended the first sale, and had notice of the adjourned sale, but it shows the very reverse of fraud or collusion. It shows that Ham's purchase was in good faith, and in full confidence of regularity. From the mere fact that he was present at the first sale, and had notice of the adjourned sale, it does not follow that he is to be charged with notice of irregularities which were not known to him, and which are not even now made patent.

3. It is objected that the deed was prematurely given; that the judgment was rendered November 18th, 1842, when the act of February 17th, 1842, subjecting real and personal estate to execution, was in force; that the execution law enters into and becomes a part of the contract; that under that act, the sheriff was only authorized to give a certificate to the purchaser, which would entitle him to a deed in fifteen months if the property was not redeemed; and that as this deed was given immediately after the sale under the law in force, at the date of the sale it was unauthorized and void.

We think this objection is without sufficient foundation. Although appellants are correct in assuming that the execution law in force at the time of the contract, enters into and becomes a part of it, still it must be borne in mind that that doctrine is only applicable to such portions of the execution law as affect the obligation of contracts. So far as execution laws are merely remedial, they may be modified and changed at any time. The method of enforcing a liability may be changed, but the liability itself cannot be impaired. If the law of a contract requires payment in cash, a subsequent law cannot constitutionally direct that payment may be made in property at two-thirds valuation. If the law of the contract stipulates that payment may be enforced by a sale of property within a given time after judgment, a subsequent law cannot change that contract by extending the time; but the new law may change the

manner in which such obligations and liabilities are to be enforced.

The substantial rights of parties under a contract, cannot be changed or impaired by subsequent laws, but the remedial directions to the officers of the law for enforcing those rights may be changed.

The execution law of February 17, 1842, was repealed February 16, 1843, and the valuation law of 1843, adopted. So far as the provisions of that valuation law were remedial, and so far as they did not impair the obligation of contracts, they were applicable to the execution under which the property in question was sold. Accordingly, the sheriff had power to deliver the deed to the purchaser as soon as the purchase money was paid. We can discover nothing in the sale or in the deed that impaired the rights of either party under the contract and judgment. The valuation and unconstitutional portion of the act of 1843, was not followed in this sale. Indeed, the whole proceeding under the execution appears to have been in substantial harmony with the execution law of the contract, until the deed was delivered to the purchaser, and in that the sheriff acted under the law in force at the date of the deed.

It is alleged that the execution defendant had, under the law of the contract, a right to redeem the property. That right is not changed by the sheriff's deed to the purchaser. The defendant could have redeemed the property from the deed, just as effectually as from a certificate. If this had been done, the deed could have been cancelled, or the purchaser would have redeeded the property. It appears by appellants' own evidence, that the appellee offered to let appellants redeem, for a period of six years after the sale, without requiring more than ten per cent. interest; but they considered the money worth more to them than the property. Hence, he cannot now be justified in saying that he was wronged or defrauded by the sheriff's sale. So long as the property did not appreciate in value equal to ten per cent., the appellants acquiesced in the purchase; but after a great

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advance in its value—after a lapse of eight years—the bait becomes too tempting to resist, and all at once, irregularities are discovered in the sale that were never thought of before. We think, under the circumstances and equities of this case, the appellants are barred by lapse of time; by their own deliberate laches; by having waived their legal rights to redeem, and by refusing appellee's generous offer to have them redeem. That lapse of time will cure more serious irregularities than those disclosed in this sale, is shown by 4 Blackf., 266; 2 Douglas, 150.^(a)

It is generally conceded by the authorities that a *bona fide* purchaser at sheriff's sale, even if that purchaser be the execution plaintiff, is not affected by any irregularity or omission of the sheriff in advertising and conducting the sale. Such purchaser is protected by the presumption that the judgment of a competent court has been correctly rendered, and that the execution in the hands of the sheriff was regularly issued, and that he performed his duty according to law. In the several cases we have had before us, involving the validity of execution sales, under various objections, the authorities cited from other states have perhaps been sufficiently considered, without again referring to them. *Humphrey v. Beeson*, 1 G. Greene, 199; *Hopping v. Burnam*, 2 ib., 39; *Corill v. Doolittle*, ib., 385; *Johnson v. Carson*, 3 ib., 499; *Sprott v. Reed*, ib., 489.

In the absence of fraud, it is the obvious policy of the law to protect judicial sales.

Judgment affirmed.

Smith, McKinlay and Poor, for appellants.

H. A. Wiltse and J. Burt, for appellee.

(a) *Ante* 75.

Rees v. Baker.

REES v. BAKER.

Where a lessee bestowed labor and improvement upon the ground rented on shares, by cultivating the same, and by putting in seed furnished by the lessor; and where the lessor took possession of the premises in the spring, before the crop could mature, without the consent of the lessee, and harrowed in a crop of spring grain, for the reason that the tenant's crop was frozen out; held, that the lessor was liable to the lessee for at least the amount and value of such labor.

Where land is rented to the lessee for the purpose of raising a crop of winter wheat, on shares, and the wheat is killed out by the severity of the winter, the landlord cannot be justified in taking possession of the leased premises, unless surrendered to him by the lessee, or unless the lessee refuses to put in a crop of spring grain, and share the crop with the lessor, agreeable to the original contract or lease.

Where a landlord takes possession of the premises before the expiration of the lease, without the consent or surrender of the lessee, he is a trespasser, and liable for damages.

Where land is rented upon shares, the tenant is exclusive owner of the crop, while it is growing, and the landlord is liable to him for damages, if he harrows up the ground sowed with grain, even if no amount of damage is proved.

A lease of land for a share of the grain produced is not terminated by a failure of the crop.

Appeal from Jasper District Court.

Opinion by GREENE, J. This suit was commenced by Shelby Baker against Thomas Rees, before a justice of the peace. The plaintiff filed a written petition in which he alleges in substance that in the fall of 1852, he rented of the defendant about eight acres of land on shares; that he plowed and cultivated the land, and sowed fall wheat upon it in good season, and placed the same in a good condition for a crop, with the understanding that he should gather the same and share equally with the defendant who furnished the seed; that early in the spring following, the defendant without plaintiff's consent or knowledge, entered upon said land and growing crop, and dispossessed the plaintiff of the ground which he had rented, and har-

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rowed it over and sowed it with spring grain, and thereby deprived the plaintiff of all benefit for the labor which he had performed and the wheat which he had sowed on the rented ground; and that the defendant had appropriated the benefit thereof entirely to his own use. The petition claims damages to the amount of sixty dollars. The defendant answered orally, and denied the allegations in the petition.

The plaintiff obtained a judgment before the justice. Defendant appealed to the district court, where judgment was again rendered against him, and thereupon he took an appeal to this court.

1. It is urged that the court erred in instructing the jury, as shown by the first bill of exceptions. We find in this bill of exceptions instructions upon two points: 1. As to the measure of damages. 2. As to the liability of the defendant for entering upon and appropriating to his own use, the land which he had rented to the plaintiff. Upon the first point, the court instructed the jury, "That the plaintiff could prove the amount of labor, and the value thereof, and recover therefor, as his measure of damages in this case." To this instruction we see no serious objection. When a lessee has bestowed labor and improvement upon the premises, in the way of preparing the ground and putting in a crop, and when the lessor furnished the seed, with the understanding that he was to have half of the crop, but took possession of the grounds and improvements without the consent of the lessee, in the spring, before the crop matured, for the reason that the grain sowed was frozen out, the lessor is at least liable to the lessee for the amount and value of such labor. In consequence of the cultivation given to the grounds by the lessee, it appeared that the lessor put in a spring crop by merely using the harrow; thus showing that the condition of the ground was much improved by the labor of the lessee.

It is objected that the plaintiff only rented the ground to raise a crop of winter wheat; and as the wheat was frozen

out by the winter, the defendant was entitled to the premises as soon as the fact was discovered, without paying for any cultivation or improvement resulting from the labor of the tenant. But we cannot concede that the landlord was entitled to the possession of the premises, until after the time of harvesting the crop, unless the lessee surrendered the premises, or refused to put in a crop of spring grain, and share the crop with the lessor, agreeable to the original contract or lease. As he took possession of the premises before the expiration of the lease, without the consent or a surrender of the lessee, he was a trespasser.

According to the second instruction in the first bill of exceptions, the court charged, "That if the jury find that defendant entered upon the land described in the petition, and harrowed over the same, he was liable for damages, even if the plaintiff did not prove any amount of damages." This instruction is not erroneous. A trespasser is unquestionably liable for damages. In this case the record shows that the landlord became a trespasser. In entering upon the demised premises and appropriating the possession to himself, before the expiration of the term for which he had let them, without the consent of lessee, he was a trespasser. The fact that the lessor would be entitled to a portion of the crop after it was harvested, does not change his liability. This share was in the nature of rent, and until that was delivered, the exclusive ownership of the growing crop was in the tenant; *Woodruff v. Adams*, 5 Blackf., 317.

2. The errors complained of, in the second bill of exceptions, are fully disposed of by those already considered. It appears that defendant's attorneys asked the court to give certain instructions, which the court refused. As these instructions are in direct conflict with those referred to in the first bill of exceptions, it follows that they were correctly refused. These instructions virtually assume that, if a tenant rents ground to work on shares, and if it appears that the crop fails, the landlord may at once take possession of the premises, and appropriate to his own benefit, all the

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cultivation made by the tenant, without being liable to him for damages. According to this doctrine, if the tenant's first sowing or planting fails, he might be precluded from sowing or planting a second time, on ground prepared by him for a crop. A lease on shares for years, might be terminated by any accidental failure of the tenant to secure good seed, or to sow or plant at the right time. It is not unusual for the first and even the second planting of corn to fail, and still a good crop be raised from the third planting. It is not unusual for a growing crop of winter wheat to be destroyed by the severity of winter, and to use the same ground in the spring for spring wheat, oats, or barley, without again plowing the land. But if the rule contended for in this case should prevail, it would follow that a tenant's lease may be terminated as often in a year, as it becomes necessary to replant the ground, and thus subject him to gross injustice and wrong.

Judgment affirmed.

Eastman and Pollock, for appellant.

H. J. Skiff, for appellee.

LOT TWO *et al.* v. SWETLAND.

Service by publication is not good, unless authorized by the court after the return of the notice to the appearance then therein designated.

It is the policy of the law to secure actual service of notice upon the party, against whom judicial proceedings have been commenced; and constructive service, by publication, should not be resorted to, unless the court is satisfied that every reasonable effort has been exhausted to secure actual service.

Before a judgment or decree can be rendered by default, where the service has been by publication only, the proof required by § 1826 of the Code, should be satisfactorily made to the court, and the fact that such proof was made, should appear of record.

The court should be satisfied that the "reasonable diligence" required by § 1826 has been exercised by *bona fide* efforts.

Appeal from Cedar District Court.

Opinion by GREENE, J. In this case, a decree was rendered to foreclose the equity of redemption, on a tax title, against the owner of lot two in section twenty-five, in township seventy-nine, north of range three west. The decree shows that notice of the commencement of the action was published four weeks successively, in a weekly newspaper, and gives no other reason for the exercise of jurisdiction, where there was no appearance or personal service upon the owner of the lot. The transcript shows that the notice was issued, and returned by the corner, on the third of January, 1853. The first day of the term of court, to which the notice was made returnable, was April 18th, 1853. The proof of publication, shows that the notice had been published about two months before the return day of the notice, and the term of court at which the publication should have been ordered.

This court decided in *Pinkney v. Pinkney*,^(a.) that a

(a.) *Ante*, 324.

notice by publication is not valid, unless ordered by the court, after the original notice was duly returned to the court, at the appearance day therein designated. It is the obvious policy of the law to secure actual service of notice upon a party, against whom judicial proceedings have been commenced, and unless a court is satisfied that every reasonable effort has been exhausted to secure actual service the uncertain method of giving notice by publication, should not be resorted to; and in no instance, should constructive service by publication be considered good, unless the publication was expressly authorized by the court.

As the record in this case, shows that the notice by publication, was prematurely made, and was not authorized by an order of the court, it cannot be considered a constructive service of notice, and therefore gave the court no jurisdiction over the owner of the lot.

There is also another serious jurisdictional defect in the record and decree in this case. It does not appear that "A copy of the petition, and notice was directed to the defendant, at his usual place of residence, in sufficient time for his appearance;" nor does it appear that such residence was "unknown to the plaintiff, or his attorney, or his business agent, and could not with reasonable diligence be ascertained," Code, § 1826.

Before a judgment or decree can be rendered by default where the service has been by publication only, the proof required by this section of the Code should be satisfactorily made to the court, and the fact that such proof was made, should appear of record. *Broghell, et al v. Lash*, 3 G. Greene, 357; *Pinkney v. Pinkney*, ante 324.

But it is objected that the owner of the lot was unknown, as shown by the proceeding against the lot alone. The fact that the suit was not commenced against the owner of the lot by name, is no evidence that the owner's name and residence might not have been readily ascertained. The recorder's office should at least disclose the name of the

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owner of record. Hence there is no necessity for proceeding against the "unknown owners" of land, or against the land itself. The owner's name can readily be ascertained, either from the United States land office, or from the recorder's office, by the exercise of "*reasonable diligence*;" and in ascertaining the name of the owner, his residence could ordinarily be ascertained, at least by a reasonably diligent effort. The court should be satisfied that this reasonable diligence has been exercised to ascertain the name and residence of a party, before ordering a judgment against him by default. The belief of the plaintiff or his attorney, that reasonable diligence had been exercised should not satisfy the court. The court should require them to show what their efforts have been, and be satisfied that these efforts were *bona fide*, and that they show "reasonable diligence."

The record before us is so entirely deficient in all these important prerequisites to an exercise of jurisdiction over the defendant, on whom no service, and by whom no appearance had been made, that we must send the case back to the district court, for further efforts to secure at least a legal constructive service under the Code.

Decree reversed.

Stephen Whicher, for appellant.

Wells Spicer, for appellee.

 Rowan v. Lamb.

 ROWAN *et al.* v. LAMB.

1. Where the bill of exceptions does not purport to give all the evidence in the case it will be presumed that the evidence adduced on the trial was sufficient to justify the decision.
 2. Where a bill of exceptions describes in detail the exhibits and title papers introduced, and states, "Putting all the evidence offered by the plaintiff to sustain the issue on his part, it must be concluded that no other evidence was offered in behalf of plaintiff."
 3. The official acts of a master of a U. S. S. r. that a notice of a mortgage sale was duly made, cannot be objected to in the supreme court, unless the objection was first made in the court below.
 4. Title *bona fide* derived under a deed of trust, where the trustees were vested with the power to sell, and also with the legal title, will not be disturbed by those irregularities, in reference to the powers of the trustees, which might affect the validity of the sale, where the power to sell is not coupled with the title.
 5. Where title is derived from trustees, who had the legal title as well as the power to sell, such title can only be divested by direct proceeding in chancery, and can only be overcome by a paramount antecedent title.
 6. The majority opinion in *Tyler v. Glover*, 3 G. Greene, 387, overruled, and the principles laid down in the dissenting opinion, in that case, adopted.
 7. An attachment is auxiliary and incidental to the proceedings over which the district court is invested with general jurisdiction; hence, the attachment may be defective and the principal case not so.
 8. Where a writ of attachment cannot be returned to levy, "Upon the defendant's property in Lee county, Iowa," and returned on the back of the writ, "Served the writ in attachment by attaching," &c., certain property described in the return, it will be presumed that "The property attached was the property of the debtor."
 9. A court will not intend facts inconsistent with the return of a writ in order to divest rights acquired under it; but will rather presume a levy to have been duly made, in order to support those rights.
- An officer will be presumed to have done his duty, as commanded, till the contrary appears.
10. A court of inferior or limited jurisdiction must show in its records, or in its judgments, that it has jurisdiction over the subject matter and the parties. If it has a *proprium* that such a court has jurisdiction, it will be inferred that its proceedings were regular.
 11. In an attachment, it is the levy that gives the court jurisdiction over the property, and not the return on the writ.

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12. Presumptions are allowed when the facts to be presumed are consistent with the duty, trust or power authorized, and tend to subserve the purposes of justice; but where the act would be unauthorized by the trust or office, or contrary to the duty of the party assuming the power, no such presumption can be admitted.
13. Every vital jurisdictional fact must be apparent; and while we cannot merely presume the existence of such a fact, we cannot presume against it, even to disstain an inferior court of jurisdiction; so in attachment proceedings, the court will not presume the jurisdictional fact of a levy; but where that fact is established by the officer's return, or otherwise, a court may call in the aid of presumption to support a mere detail or incident connected with the levy, to show that the officer obeyed the directions of the law in making the levy.
14. An attachment proceeding does not curtail or limit the jurisdiction of the court, but it may help to define it; and if before a court of general jurisdiction, it is of no consequence that the court's jurisdiction does not apply in regard to the execution of official duties, as apply to any other case of general jurisdiction; and where there appears to have been a writ founded upon the requisite authority, and where the officer appears to have complied with the mandate of that writ by making the requisite levy, that levy gives the court jurisdiction over the property attached.
15. Where, under attachment, a legal levy has in fact been made, a mere omission in the return to state the particulars in reference to the levy, or the ownership of the property attached, will not impair it, nor affect the jurisdiction of the court over the property.

Appeal from the District Court.

Opinion by CHAMBERLAIN, J. Petition for partition, filed by W. Lamb, against John H. Rowan and Henry McKee. Petitioner claims title to five undivided three-fourths of certain land and lots in Lee county, and that McKee owned the other fourth. The petition avers that John H. Rowan claimed to be the owner of the same lands and lots; that his claim is unlawful and unjust, as to the three-fourths claimed by petitioner, and questionable as to the other fourth. Petitioner prays for partition, and that his title may be quieted.

Rowan's answer denies the right of Lamb to the lands described in the petition, and claims the entire title in himself. In support of his title he exhibits: 1. The judgment of partition of the half-breed lands of Lee county, made by the district court in 1841, by which the lands and lots

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in question were allotted to Henry McKee. 2. A suit by attachment, instituted by W. A. Clark, against said McKee, under which the lands and lots were levied upon, and after judgment, transferred by sheriff's deed to Thomas Breeze and Lewis R. Reeves. 3. Conveyances from said Breeze and Reeves to Rowan. The answer calls upon petitioner to produce his title. Petitioner replies, and admits McKee as the source of his title, but denies that Rowan has any interest in the lands by virtue of the attachment proceedings and the conveyances made by those claiming under them; that if Rowan did acquire any right, under the attachment suit, they are invalid as against petitioner, and those under whom he claims, because purchased without notice of said proceedings and conveyances, and because the proceedings in attachment and the sale were fraudulent and illegal; that Rowan purchased with notice of those irregularities; that he was a mere volunteer under his brother, of the firm of Rowan and Brown, the assignees of the attachment judgment and sale, and for whom said lands were held by said Breeze and others, until conveyed to defendant, by direction of his brother, for the purpose of keeping the lands from his creditors. The replication exhibits petitioner's title, commencing with the judgment of partition under McKee. 2. A deed from McKee to George Collier and William Glasgow. 3. Conveyances from them to petitioner.

The rejoinder reaffirms the averments of the answer, denies fraud, and denies being a mere volunteer, as charged in the replication. It reaffirms his title under these pleadings and the title papers referred to. Under these pleadings the case was submitted to the court.

We learn from the bill of exceptions, that after the petitioner filed his title papers, with the replication, they being all the evidence offered to sustain the issue on his part, the defendant moved for a non-suit. The motion was overruled. The defendant then offered his evidence, consisting of the records and title papers referred to, as exhib-

ited with his answer. This was all the evidence introduced, as we must infer from the bill of exceptions, by either party.

The court thereon rendered a judgment of partition, giving to Lamb three-fourths, and to Rowan one-fourth of the real estate described in the petition.

We will, in the first place, briefly consider a preliminary point, urged by appellee in support of the decree below. It is strongly urged that the record does not disclose all the evidence, and that consequently this court must presume that the evidence adduced was sufficient to justify the decree as rendered, and that unless the transcript gives all the evidence introduced by complainant, it must be presumed that the motion for non-suit was correctly overruled. This would necessarily be the case if the transcript did not contain all the evidence. But in this particular the bill of exceptions is sufficiently explicit. After describing in detail, the exhibits and title papers introduced by plaintiff, the bill of exception states: "being all the evidence offered by the plaintiff to sustain the issue on his part," &c. From this we conclude that all the evidence is before us upon which the application for a non-suit was overruled, and that we are therefore sufficiently in possession of the case to review the decision upon that motion.

1. It is urged that the court below erred in overruling defendant's motion for non-suit, on the ground: 1. That plaintiff derived his title from Glasgow and Collier, who were only grantors of a mortgage, with power of sale, and that the *ex parte* evidence introduced, does not legally show that the power of sale had been executed. 2. That the mortgagee and his assigns or grantees, without possession or entry upon foreclosure, are not owners, so as to maintain the action of partition. The *ex parte* evidence objected to as illegal, are the affidavits of the newspaper publishers that the notice of sale was duly published. But as these affidavits were admitted without objection in the

court below, they cannot now be questioned. They show a substantial compliance with the directions given in the mortgage, as to the manner of making the sale. Even if valid, the objection should first have been presented to the court below. On this point, therefore, we cannot disturb the ruling of the court against a motion for a non-suit. But it is objected that the exhibits do not show plaintiff to be owner of the land, as alleged in the petition. The mortgage to Glasgow and Collier, with the power of sale, possessed all the virtues of a deed of trust, and vested in them the legal title, as trustees, and hence, a deed from them would convey the legal title to the purchaser. The irregularities of this rule, as urged by appellee's counsel, are no such as could have been considered by the court, on a mere motion for non-suit. This could only be done in a direct chancery proceeding, in which all concerned should be made parties. *Pro hoc facto*, plaintiff's exhibits showed him to be an owner of the property. He claimed title under McKee by virtue of a deed of trust, executed in August, 1842, to Glasgow and Collier for the benefit of James Harrison, a creditor. Under these trustees, who were not only vested with power to sell, but also with the legal title, the plaintiff appears by his exhibits, in the light of an innocent purchaser. Where trustees are thus vested with the title, as well as the power, it is not necessary to show that title complied with the directions of the power, as it would be, if the power was not coupled with the title.

As plaintiff connects his right with those who had the title, as well as the power to sell, his title can only be divested by a direct proceeding in chancery, and can only be overcome by a paramount antecedent title. We are therefore of opinion that the court did not err in overruling the motion.

2. The second error assigned is, that the judgment on the merits should have been for defendant's title to all the

land. It is claimed that defendant's title is anterior and paramount to plaintiff's.

The defendant's title is derived, under a judicial sale, made by virtue of a judgment in a suit in which a writ of attachment was issued, and levied on the land in question, in April, 1842, four months before the deed of trust, was executed. If, therefore, the attachment levy was valid, the defendant's title must necessarily prevail. This question we approach with great reluctance, and with a realizing sense of the responsibility involved. We must either come in conflict with the carefully adjudicated case of *Tiffany v. Glover*,^(a) or else in conflict with our own convictions of the law and justice of this case. The opinion in *Tiffany v. Glover*, was sanctioned by two of the judges only, but the highly respected author of that opinion has since given place to another incumbent, and this circumstance increases our hesitation to disturb the ruling in that case. Besides, we are fully impressed with the importance of stability and uniformity in judicial decisions. Such a case should not be overruled for unimportant or doubtful reasons. It should only be done to avoid greater wrong; or when justified by decidedly greater weight of authority.

In *Tiffany v. Glover*, the court held that "The sheriff, should have returned, that the property attached, was the property of the defendant," that "in no other way could the court, legally know the fact, and until this fact, was before the court, could the court proceed against the land as the land of defendant;" that, "As the fact that it was attached as the property of the defendant, was essential to constitute a levy, such fact could not be established by extraneous evidence *de hors* the return," that the attachment and sheriff's return became monuments of title &c.

Thus the technical accuracy of the sheriff's return, is

(a) See 3 G. Greene, 385.

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made essential to the jurisdiction of the court over the land, and essential to the validity of the levy and attachment proceedings.

In the case at bar, as in that of *Tiffany v. Glover*, the sheriff neglected to state in his return, that "The property attached, is the property of defendant." Should this omission be adjudged fatal to the levy and proceedings in attachment; or should it be considered sufficient to take all power from the court and render the proceedings *coram non judice*?

The majority of the court, feel themselves constrained to adopt the principle laid down in the dissenting opinion of *Tiffany v. Glover*.

In that case, as in this, the attachment proceedings were collaterally attacked, and not in a direct proceeding. The question arises then, is the objection one of jurisdiction, or of mere irregularity. Is it void, or only voidable? If the former, *Tiffany v. Glover*, should be sustained. If the latter, it should, on principle and authority, be overruled.

The writ of attachment was issued by a court of general jurisdiction. It was issued, not as an original proceeding but as auxiliary and incident to other proceedings, in which the court was invested with general jurisdiction; hence the auxiliary process might be defective, and the principal cause not so. It was issued upon the requisite affidavit, and served by levy, as commanded, "upon the defendant's property, in Lee county, Iowa." The sheriff returned on the back of said writ, "Served the within attachment, by attaching" &c., certain property described in the return.

The sheriff was commanded by the writ, to attach the property of defendant in Lee county.

It is obvious, that the power of the sheriff, was limited to the property of the defendant within the county of Lee; and that he could levy upon no other property, without violating the commands of the writ and his oath of office.

Will it be presumed that an officer has violated his commands, trampled upon his official obligation, and trespassed

upon the rights of others? Can any decision be legally sound that rests alone upon such negative presumptions? There is no legal maxim so free from exception, as *omnia presumuntur rite et solemniter esse acta dom probitur in contrarium*. Every thing is presumed to be legally and duly performed until the contrary appear. This is especially the case when the acts are of an official nature. There is no presumption of law more frequently indorsed by authority, than, that judges, jurors or sheriffs, do nothing carelessly, maliciously or without authority; that the decisions of courts of competent authority, are well founded, and that a court will not intend facts, inconsistent with the returns of a writ, in order to divest rights acquired under it. It will rather presume a levy to have been duly made in order to support those rights; 11 John 517. The authorities are uniform in support of the rule, that an officer will be presumed to have done his duty, as commanded, till the contrary is shown. C. Litt, 232; 3 East, 192; 10 ib., 216; 1 T. R. 503; 3 Black. Com., 371; 2 Black R. 852; 19 John, 347; 6 Peters, 729; 9 Cb., 134; 10 ib., 478; 12 ib., 437 and 438; and other cases cited in the dissenting opinion of *Tiffany v. Glover*. But it is claimed that the jurisdiction of the district court in attachment proceedings, is inferior and limited, and that nothing can be intended in favor of its jurisdiction but that which is expressly alleged. It is true that a court of inferior or limited jurisdiction, either in fact, or in subject matter, must show in its records or its judgments that it has jurisdiction. But it need not detail all the facts and particulars which confer that jurisdiction.

The jurisdiction of such a court should appear, but there is no particular form in which it should be made to appear. If it appear upon the face of the proceedings that such a court had jurisdiction, it will be inferred that its proceedings were regular; but unless it so appear, or in other words, if the proceedings show affirmatively or inferentially, that the inferior court had no jurisdiction,

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no such intendment as to irregularity will be made. Now, even admitting the district court to be one of inferior and limited jurisdiction as to attachment proceedings, does it follow that a defective return of the writ shows a want of jurisdiction? We fully agree with a majority of the court, in *Tiffin v. Clover*, that the jurisdiction of an inferior court over the property attached, would depend entirely upon the legality of the levy. True, as stated, it is the levy that gives the court jurisdiction over the property. But the objection in this case, as in that, is not to the levy. It is not pretended in either case that the levy was defective; nor that the property levied upon was not the property of the defendant, but only that the sheriff neglected to state that fact in his return. Where then is the defect? surely not in the levy. The objection then, is only applicable to the return, and no one will pretend that the return gave jurisdiction over the property. If defendant had no title in the land, it will not be pretended that the sheriff's return would vest the title in him. In this case, the title was in fact in defendant, but the return does not expressly state the fact. Can it therefore be inferred that the title was in some one else? that the officer had violated the command of the writ, and subjected himself to an action of trespass, by levying upon lands over which the writ gave him no power? Surely, such an intendment would do violence to every rule of presumptive evidence. No court, either of general or special jurisdiction, can be justified in presuming, without evidence, that one of its officers has been guilty of culpable neglect of duty. Under the most limited view of the powers of the district court in attachment proceedings, when a writ appears *prima facie* to have been so regularly sued out, levied and returned, as was the writ in the the present case, it must be presumed that any minor details not specified in the returns or proceedings, were duly performed. If, in a direct proceeding, it had been alleged that an officer had violated an important duty entrusted to him, such dereliction of duty could not

be presumed. The party alleging would have to prove the fact. 9 Peters, 134; 12 ib., 438. How then can it be presumed, in a collateral proceeding like the present, when no such allegation is made, and when the very records of the case before the court show the fact that the sheriff did levy upon the property of the defendant as instructed?

In *Tiffany v. Glover*, we think the court reversed the established order of presumption, by presuming, without any evidence, or circumstances to justify it, that the sheriff had not done his duty; that he had not levied upon the property of defendant.

The principle is universal in its application that presumptions are allowed, where the facts to be presumed are consistent with the duty, trust or power authorized, and tend to subserve the purposes of justice. But when the act would be unauthorized by the trust or office, or contrary to the duty of the party assuming the power, no such presumption can be admitted; 2 Comstock, 42; 3 Denio, 119; 5 Barb., 610. How then could the court in *Tiffany v. Glover*, presume that the writ was not served as directed; that the sheriff's return agreeably to the command of the writ is false, and that he had violated a known duty? This must have been presumed, or else the majority of the court must justify the decision, by assuming that the words, "The property of the defendant," in attachment returns are essential elements to the jurisdiction of the court in attachment cases. But the court say that "The jurisdiction depends entirely upon a legal levy." It cannot be, then, that technical precision in the return could be regarded as a vital jurisdictional deliberatum.

If the omission, complained of in the return, should be deemed essential to jurisdiction, we fully admit that the defect could not be supplied by presumption alone. Every vital jurisdictional fact must be apparent, and while we cannot merely presume the existence of such a fact, it follows with equal force that we cannot presume against

it—even to divest an inferior court of jurisdiction; 4 Comstock, 378. So in the present case; a levy being a vital jurisdictional fact, a court could not properly resort to presumption alone to establish the fact of a levy; but as that fact is fully established by the sheriff's return, without the aid even of presumption, and as the court was thus invested with jurisdiction, it might call in the aid of presumption to support a mere detail or incident connected with the levy. The essential fact being established that the levy was made, it will be presumed that the sheriff obeyed the directions of the law in making that levy.

When the law required service in the township, and the summons was silent as to the place of service, it was held that it would be presumed to have been served in the right township; 12 Mo., 143. So it has been held, that when the law requires process, to be read to defendant, or a copy to be delivered or delivered and certified, it will be presumed that they were done, although the return be silent in these particulars; Barb., 525.

Clearly, the defect in the case at bar, is not jurisdictional. It could not affect the powers of the court over the parties, the subject matter, or the property. It was a mere omission in the return, that might be amended on motion, or corrected according to the fact by the sheriff. The defect was not void, but at most only voidable, and although subject to correction in a direct proceeding, it is obviously not sufficient to invalidate rights and divest titles, when collaterally assailed; 2 Hill., 518.

To this conclusion, we arrive, even if it be conceded that the district court, under which the attachment proceedings were pending, was of limited and inferior jurisdiction. But that court was not thus limited in power. The general jurisdiction of the district court of Iowa has never been seriously questioned. What is there in a proceeding by attachment that should render the jurisdiction *quoad hoc* limited? Although exclusively statutory and severe in its provisions, still it is merely auxiliary to other

proceedings over which the jurisdiction of the court is in all cases general; and as antecedent to an attachment, there must be an indebtedness—a cause of action—in which the jurisdiction of the court is not limited. The writ of attachment is issued in aid of that jurisdiction. It is not the object of the writ to curtail and limit that general power, but rather to augment and make it more efficient and secure. It is intended to give a creditor a remedy in fact, as well as in form. Without this auxiliary process, the creditor could obtain a judgment, and subsequently an execution. But, with this additional power in the court, he can also secure himself against the fraudulent attempts of the debtor to remove his property beyond the control of an ordinary remedy.

1. We conclude then, that an attachment proceeding does not curtail or limit the jurisdiction of the court before which it may be pending; and if before a court of general jurisdiction, as in this case, the same general intendments apply, in regard to the exercise of official duties, as apply to any other case of general jurisdiction; and that as there appears to have been a writ, founded upon the requisite affidavits, and as the officer appears to have complied with the mandate of that writ, by making the required levy, that levy gave the court jurisdiction over the property attached.

2. That when a legal levy has in fact been made, as shown by the returns of the writ and the records in this case, a mere omission in the returns to state all the particulars connected with that levy, will not impair the levy itself, nor affect the jurisdiction of the court over the property attached.

3. That when such a writ commands an officer to attach the property of defendant, in a given county, and the officer proceeds accordingly, and shows by his returns that he attached certain property, describing it, but without calling it the property of defendant, it will be presumed, in the absence of proof or claims to the contrary, that the property attached was the property of defendant, and was bound

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under the proceedings from the service of the writ. We therefore conclude that the court below erred in not sustaining the title of Rowan under the attachment proceedings.

These conclusions are, we think, abundantly sustained by reason and authority, and as the authorities are sufficiently elaborated in the dissenting opinion in *Tiffany v. Glover*, it would seem unnecessary to refer to them more in detail, in this opinion.

Judgment reversed.

Geo. C. Dixon, for appellants.

Reeves and Miller, for appellee.

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BAKER v. CHITTUCKS *et al.*

Where a claim is filed against the estate of a decedent, under § 1533 of the Code, a copy of this written instrument or account, upon which the claim is founded, should be annexed to the claim. Action clearly stated under that section of the Code amounts to the same thing as a petition.

▲ A copy of a claim filed under § 1533 of the Code, with the time of hearing indorsed thereon, constitutes the notice to be served upon the representatives of an estate. If such claim is materially deficient, the notice is equally so.

Appeal from Scott District Court.

Opinion by GREENE, J. Maurice Baker filed in the county court of Scott county, an account against the estate of George J. Chittick deceased, for damages resulting from the mismanagement of a farm, and for back rents, amounting in all to three hundred and eighty dollars. The defendant's answer denied the indebtedness, and after a hearing in the county court, judgment was rendered in his favor. Plaintiff

appealed to the district court when judgment was again rendered in favor of defendant.

On the trial, it appears that the plaintiff offered in evidence, a written contract or lease to which defendant objected, and the objection was sustained by the court, for the reason that it was not attached to the original claim or account filed in the county court. This ruling is alleged to be error.

Appellant relies upon section 1359 of the Code, which provides that, "claims against the estate, must be clearly stated, sworn to and filed. Ten days notice of the hearing, indorsed on a copy of the claim, must be served upon one of the executors in the manner required for commencing action in the district court."

Where a claim is thus clearly stated, sworn to and filed, it is in the nature of a petition. A claim clearly stated will show the facts constituting the cause of action, and will in itself show the remedy sought, § 1736 ; and if "founded upon a written instrument or account, a copy thereof must be annexed to such pleading," § 1750. The requirement of this section is not dispensed with by section 1359. This section does not change the rules of pleading or of practice,—it dispenses with nothing. It only imposes an additional restriction as a protection to estates of decedents. The claim clearly stated, or the petition, must be "sworn to," and a copy thereof must be served upon one of the executors ten days before the time stated in the notice for the hearing, in the manner required for commencing actions in the district court.

If the claim against the estate is founded upon a written instrument, it cannot be clearly stated unless it shows the fact, and if so founded, a copy of the instrument "*must be annexed,*" and it thereby becomes a part of the petition or claim. A copy of the claim with the time of hearing indorsed thereon, is the notice to be served upon the representative of the estate. It follows that the notice is materi-

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ally deficient unless it contains a copy of the instrument upon which the action is founded. The defect then, applies not only to the petition or claim, but it applies with equal force to the notice.

It follows then, that the court below ruled correctly in deciding that a copy of the lease should have been annexed to plaintiff's claim, and so far as the bill of exceptions enables us to judge of this case, there is no error apparent. Still we cannot withhold the opinion, that as the court acquired jurisdiction over the defendant by his appearance, and as the subject matter was fairly before the court under the appeal; as the defective notice was cured by appearance and as the defect in the claim was only demurrable, the court should have authorized the plaintiff to amend, subject to such reasonable terms as might have been prescribed. The lease would then have become relevant to the pleadings, and might have been received in evidence. But as this right to amend was not urged in the court below, and as that court appears to have ruled correctly upon the only point presented, and to which exception was taken, we cannot disturb the proceedings.

Judgment affirmed.

Smith and Corbin, for appellant.

Cook and Dillon, for appellee.

MUNSON v. THE STATE.

In an indictment for stealing "money and bank notes," under the Code, the item money is sufficiently designated by the words, "gold and silver coin," and the term "bank notes" is sufficiently described by the words, "Clark's Exchange Bank bills of the value of twenty-four dollars." The following is also sufficiently descriptive of the bank bills alleged to have been stolen: "Seven dollars of other bank bills, the names of the banks to the jurors unknown, of the value of seven dollars."

"Bank note" and "bank bill," under the Code, signify the same thing. An offense is sufficiently charged in an indictment, if it substantially follows the language of the statute.

Irregularity in finding the indictment cannot be urged, for the first time, after verdict.

Error to Jasper District Court.

Opinion by GREENE, J. Indictment for larceny. Demurrer to the first and second counts sustained. Plea of not guilty to the third count of the indictment. Verdict and judgment of guilty. Defendant filed a motion in arrest of judgment, which was overruled. In overruling this motion it is claimed that the court erred.

The reason assigned for the motion, is the defective description given of the bank bills, gold and silver coin alleged to have been stolen. The third count charges that the defendant, "did feloniously steal, take, and carry away, twenty-four dollars, of Clark's Exchange Bank bills, of the value of twenty-four dollars, and seven dollars of other bank bills, the names of the banks to the jurors unknown, of the value of seven dollars, and one hundred and nine dollars of gold and silver coin, of the value of one hundred and nine dollars, the whole being of the value of one hundred and forty dollars," &c. The indictment was found under the Code, § 2612. "If any person steal, take and carry away

of the property of another, any *money*, goods or chattels," &c., "bank notes," &c., &c., he is guilty of larceny, and shall be punished, when the value of the property stolen exceeds the sum of twenty dollars, by imprisonment in the penitentiary not more than five years," &c.

The description of the money and bank notes alleged to have been stolen, comes fully up to the requirements of the Code. "Money" is sufficiently designated by the words "gold and silver coin." "Bank notes" are sufficiently designated by the words "Clark's Exchange Bank bills, of the value of twenty-four dollars," and also by the words "seven dollars of other bank bills, the names of the banks to the jurors unknown."

The term "bank note," in § 2612 of the Code, is identical with the term "bank bill." The terms are convertible, and mean the same thing. This court has repeatedly decided that an offense is sufficiently charged in an indictment, if it is substantially in the language of the statute. *State v. Seamons*, 1 G. Greene, 418; *Buckley v. State*, 2 ib., 162; *Nash v. State*, ib., 286; *State v. Chambers*, ib., 302.^(a)

In *People v. Kent*, 1 Doug., 42, it was held that a description of the property stolen, as "bank notes," or "bank bills," merely following the language of the statute is sufficient. See also *State v. Cassell*, 2 Har. and Gill., 407; *Pomeroy v. Commonwealth*, 2 Virg. Cas., 342.

In this case the indictment not only described the property stolen as being "bank bills," but it also declared the value of said bills; thus, in effect, charging the bills to be genuine, and upon solvent banks.

Another reason assigned in the motion for the arrest of judgment is, that the indictment was irregularly and improperly found. No such irregularity appears of record. Besides, this objection came too late. If there was any foundation for the objection, it should have been urged before the trial.

(a) *Romp v. State*, 3 G. Greene, 276; *Winfield v. State*, ib., 339.

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It was held in *Wau-kon-chaw-neek-kaw v. United States, Morris, 332*, that irregularity in finding an indictment, cannot be objected to, after verdict, when the party goes to trial without objection.

Judgment affirmed.

E. W. Eastman, for plaintiff in error.

D. C. Cloud, Attorney General, for the state.

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BRAINARD v. HOLSAPLE.

Where a petition prays for the rescission of a contract, but the *gravamen* of the petition is the failure of the defendant to pay for land, as stipulated in the contract; and where the petition avers neither fraud in the contract, nor the insolvency of the purchaser, so as to give the court jurisdiction in chancery, it should be dismissed for want of equity.

Where a petition shows a case in which a perfect remedy would be afforded by a court of law, it cannot claim that relief which can only be awarded by a court of equity.

The cases in which equity relieves by setting aside deeds, contracts, &c., are founded upon actual fraud in the defendant, or upon constructive fraud against public policy.

A petition in equity must show a right to relief beyond the mere breach of a contract, which would confer a right of action at law.

Although the rescission of a contract is the converse of a specific performance, still such rescission requires a stronger cause, ordinarily, than to resist a specific performance,

Appeal from Jackson District Court.

Opinion by GREENE, J. In this case, Lorenzo D. Brainard filed his petition praying the rescission of a contract for the sale of land which he, as vendor, had made to the defendant, John A. Holsaple. The most prominent fea-

tures of the bill consist in minute averments as to the manner in which the defendant had failed, on his part, to comply with the terms and conditions of the contract, showing as alleged, that defendant had failed to do those things which he had promised to do in payment of the lands.

To this petition defendant demurred, and the demurrer was sustained. Several causes of demurrer are assigned, but they mostly resolve themselves into one, to wit: The plaintiff had under his contract, a plain and adequate remedy at law.

The *gravamen* of the petition is the failure of the defendant to pay for the land as stipulated in the contract. It seeks to recover damages for a breach of contract. It shows a complete case at law, but furnishes no foundation for equity jurisdiction. It shows no equity under specific allegations of fraud. It avers nothing like insolvency or inability to pay on the part of the vendee. It shows merely a sale of land to be paid for partly in work and partly in cash; that only a portion of the work had been done, and that so imperfectly as to be of no value; that one cash payment had fallen due, and had not been paid; and that plaintiff had suffered damages to the amount of seven hundred and twenty-five dollars, and claims to recover accordingly.

The petition furnishes no foundation for equity jurisdiction, and still in claiming a rescission of the contract, it prays the equity side of the court for relief. Where a petition shows a case in which a perfect remedy was to be afforded at law, it cannot claim that relief which can only be awarded by a court of equity.

In an appropriate case, when a court of chancery acquires jurisdiction, a contract may be cancelled; but such jurisdiction cannot be acquired in a case like the present, where no fraud is charged, and in which the petition alleges a state of facts, and a claim for damages, which can be fully relieved at law.

The cases in which equity relieves, by setting aside or rescinding deeds, obligations or contracts, are founded upon actual fraud in the defendant, in obtaining the obligation or contract, or upon constructive fraud against public policy. Unless a petition presents such a case—unless it shows *prima facie*, that the defendant is not entitled to the instrument against which relief is sought, it clearly follows that the petition cannot be entertained by a court of equity. The petition must show a right to relief beyond the mere breach of a contract which would confer a right of action at law.

Although the cancellation of a contract is the converse of a specific performance, still it is generally agreed that to justify the cancellation requires a stronger case than to resist a specific performance. Now, it cannot be pretended that the petitioner could resist a specific performance of the contract set out in the petition in this case, on payment of the price of the land stipulated in the agreement.

The petition in this case, is dismissed without prejudice.

Decree affirmed.

Smith, McKinlay and Poor, for appellant.

D. F. Spurr, for appellee.

BUMFORD v. PURCELL.

B., as principal, and P., as security, signed a note to D., for town lots purchased by B. Before the notes matured, B. proposed that he would relinquish the lots to P., if P. would pay the note, and save B. harmless. B. soon after left the state. After judgment was obtained against P. on the note, he paid the same; and subsequently, in a suit against B. for the amount, B. proposed to prove by parole, the agreement under which P. was to pay the note, and B. relinquish to him the lots; held, that parole proof was not admissible, and that such an agreement, unless in writing, is within the statute of fraud, and void.

▲ parole promise to pay the debt of another, without consideration, is void by the statute of frauds, even if that promise was made by a party who signed the note as security or indorser.

All contracts for the sale of land, or for any interest in or concerning them, should be in writing; hence an agreement by B. to relinquish a purchase of lots to P., upon condition that P. would pay B.'s note to D., which was signed by P., as security, should be in writing.

Appeal from Muscatine District Court.

Opinion by GREENE, J. This action was commenced by Jesse Purcell, to recover from Samuel Bumford the amount of a judgment paid by him for Bumford, and which had been rendered against Purcell, on a note which he had signed as security for Bumford. Defendant, in his answer, denied the indebtedness, and alleged that plaintiff agreed to pay the note, and take certain town lots in payment. Plaintiff's replication re-asserts the indebtedness, as averred in the petition, and denies the allegations in the answer as to his agreement to pay the note and take town lots in return. Trial by jury. Verdict and judgment for plaintiff.

On the trial below, it appeared that the note signed by Samuel Bumford and Jesse Purcell, was given in payment

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of certain lots bought by Bumford, in Maysville, Indiana ; that before the note became due, Bumford left the state, so that Purcell had the note to pay ; that before Bumford left the State, and before the note became due, Bumford proposed an arrangement with Purcell, who was the surety on the note, that he should pay the same, and take Bumford's place ; and agreed to relinquish his right to said lots to Purcell ; and that they started to a magistrate's office to perfect the arrangement. The court ruled that the promise of Purcell to hold and save Bumford from liability on the note, should have been in writing in order to be binding, and that Bumford's relinquishment of title in said lots to Purcell, should have been in writing ; and that parole testimony could not be received to establish said arrangements. This ruling of the court is assigned for error, and involves two propositions : 1. That Purcell's undertaking to pay the note for Bumford must be in writing. 2. Bumford's agreement to relinquish the lots to Purcell should also be in writing.

1. The first proposition comes within that provision of the statute of frauds which excludes evidence of a contract, wherein one person promises to answer for the debt, default or miscarriage of another, unless such contract is in writing ; Code, § § 2409 and 2410. This is a uniform requirement in every statute of frauds. In some of the states it has been held that such contract must not only be in writing, but the consideration must be good ; *Wyman v. Gray*, 7 Har. and J., 409 ; *Elliott v. Giese*, ib., 457 ; *Elder v. Warfield*, ib., 391 ; *Mundy v. Ross*, 3 Green, 466 ; *Colgin v. Henley*, 6 Leigh., 85. In *Casten v. Moss*, 1 Bailly, 14, it is declared that a promise to pay the debt of another, without consideration, is void by the statute of frauds, unless it be in writing ; *Anderson v. Davis*, 9 Verm., 136 ; *Clark v. Russel*, 3 Dall., 415 ; *Hoyport v. Wilson*, 1 South., 149 ; *Ditts v. Parke*, ib., 219 ; *Youngs v. Sough*, 3 Green, 27 ;

Boyce v. Owens, 2 McCord, 208; *Stephens v. Winn*, 3 Brevard, 17; *Bronson v. Strand*, 2 McMullan, 372.

In *Hodghins v. Bond*, 1 New Hamp., 284. A and B. gave a note to C., and afterwards, in order to procure a further day of payment, agreed to procure the guaranty of D; D. accordingly signed the note in blank, and said he was liable for its payment; held, that the undertaking of D. was to pay the debt of another, and that his mere signatures was not a memorandum in writing, signed by the party within the meaning of the statute of frauds.

In the case at bar, it is true that Purcell was legally liable as surety to pay the note to the holder, but that liability did not exist as between Purcell and Bumford. No consideration or argument in writing had passed between them. Bumford agreed to relinquish his right to the lots, but did not do so. A promise to release, is not a relinquishment. A promise to pay, is not a payment. Even an agreement in writing to answer for the debt of another, has been held to be void, if no consideration move between the plaintiff and defendant, either of forbearance or otherwise; *Elliot v. Giese*, 7 Har. and J., 458; *Leonard v. Vrendenburgh*, 8 Johns., 29; *Bailey v. Freeman*, 4 John., 280; *Tainney v. Prince*, 4 Pick., 385.

The bill of exceptions shows that the parties agreed to make an agreement, but the agreement was not closed. Consequently the relation between the parties was not changed.

If the promise in this case had been complete and absolute, and founded upon an actual legal transfer of the lots to Purcell in writing, that transfer coupled with Purcell's liability to pay the note as security or indorser, would remove the case from the statute. In *Spunn v. Baltzell*, 1 Branch., 281, it is decided that an absolute promise by an indorser of a note, founded on a new and valuable consideration, to pay the amount of such note to the holder, is not within the statute of frauds. In the absence of such new and valuable consideration, or

if the promise is not absolute, only conditional, dependent upon a condition to be performed, it follows that such promise would be within the statute and void; and although the indorser might be required to pay the note as indorser or surety, he could hold the maker or payor for the amount. As the bill of exceptions shows that the defendant in this case, did not propose to prove an absolute promise to pay the note founded upon a new and valuable consideration, the court very properly refused to admit parole proof of such promise.

2. That Bumford's agreement to relinquish the lots to Purcell, should have been in writing, cannot be questioned. All contracts for the sale of lands, or for the sale of any interest in or concerning them, should be in writing and signed by the party to be charged therewith. This principle is recognised in every state of the Union, and is embodied into every statute of frauds. It has been so long and so generally recognized in all countries where the common law is in favor, that it may now be considered an established principle of law, in the absence of the statute of frauds. Chitty on Con., 241, n. 1; ib., 243, notes, 1 and 2; 2 Stark Ev., 347, n. 1.

We find in *Hasbrouck v. Tappen*, 15 John. 200, a case involving principles of law which are particularly appropriate to this case. In that case, it was held that when the subject matter of an agreement was the sale of land, a parole promise, made by the vendor, that he would take no advantage of a delay of performance beyond the time fixed, was not deemed a waiver of the party's right to recover a stipulated sum, as liquidated damages for not performing on the day; such promise being void by the statute of fraud, and therefore incapable of affecting the previous contract.

Upon the same principle in this case, the subject matter of the agreement being the sale or transfer of lots, a parole promise made by the security to pay the note in consideration of a transfer of the land, and as no such transfer was

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made, the entire transaction for a double reason should be considered within the statute of fraud; and the security should not be deemed as having waved his right to recover from Bumford, the amount he had paid for him. We say for a double reason, because this contract as stated in the bill of exceptions, embraces two distinct stipulations, neither of which can be supported by evidence under the Code, unless it be in writing and signed by the party charged, or by his lawfully authorized agent. 1. The stipulation wherein one person promises to answer for the debt of another. 2. The stipulation for a transfer of an interest in land, Code § § 2409, 2410. Similar provisions have been either expressly adopted or recognized as common law throughout the United States.

The policy of the law in requiring such contracts to be reduced to writing and subscribed by the party to be affected, is founded on wisdom and justice. Owing to the fallibility of memory, and the uncertainty of parole proof, the common law had very wisely forbidden a resort to that kind of proof, to vary, contradict or explain, a written contract. Nor should that fallible and uncertain kind of proof be permitted to supersede the necessity for written contracts, in those more solemn and weighty transactions between men, wherein fraud was most likely to enter. From remotest antiquity, laws have required more form and solemnity in real estate transactions, than in those affecting mere chattel interests. The greater stability, dignity and value of freehold, rendered it all important, that titles thereto should become matter of record, and be removed as far as possible beyond fraudulent efforts.

The other transactions protected under the statute of fraud, by requiring greater formality and care are materially different from the ordinary transaction in business life, wherein the utmost facility is necessary to promote the interests of trade and commerce. The experience of several generations, has demonstrated the great utility and wisdom of the statute of frauds, and therefore courts should require

at least a substantial observance of those salutary provisions. For that reason the decision in this case, should not be disturbed.

Judgment affirmed.

Cloud and O'Connor, for appellant.

W. G. Woodward, for appellee.

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BUFORD & Co. v. FUNK.

Under the Code, two or more causes of action may be united in the same petition. Hence an action on a contract performed may be united with an action on account, and both be included in one account. This will not preclude either party from using the contract as evidence of the items therein designated.

Where a special contract had been fully performed by plaintiffs, and nothing remained but defendant's liability to pay the money, a general petition on account may include such amount due on the special contract.

A special contract to furnish an engine may be considered abandoned by defendant, where the plaintiffs proposed and were ready to set up the engine at the time stipulated, and again three months after, but both times defendant declined having it done; also where the plan of the engine subsequently ordered and set up, was materially changed, by direction of defendant; and also where defendant acknowledged the correctness of an account, subsequently presented, and which included the price of the engine.

Appeal from Muscatine District Court.

Opinion by GREENE, J. Furgus Buford & Co., commenced this suit against Henry Funk, on an account for an engine and sundry items from their machine shop. Defendant's answer sets forth a special contract and claimed damages, on the ground that the engine had not been furnished according to contract. The replication

admits the contract, and claims that plaintiffs performed the work therein specified with such variations as were subsequently agreed to between the parties. It also denies all new allegations set forth in the answer. We learn from the bill of exceptions, that on the trial, before any testimony was offered by the plaintiffs, the defendant raised an objection that the action would not lie in the manner and form, as the same was brought for the reason that the pleadings show there was a special contract which should have been the gravamen of the action; whereupon plaintiffs' counsel admitted to the court that there was such a bargain made in writing, as set forth in defendant's answer, which was signed by the plaintiffs but not signed by defendant, and was not in plaintiffs' possession; that plaintiffs then offered to prove by witnesses then present, that the defendant purchased and used the articles mentioned in the three bills of particulars appended to the original petition; that the dates and prices thereto affixed were the true dates and the true value; that on the date stipulated for furnishing said engine, the plaintiffs were ready and willing to set up and start the same, agreeable to contract, but the defendant was not ready to have it done; that at a period some three months later, the plaintiffs again offered to set up and start the engine, but said defendant was not even then ready to have it done; that November 19th, 1842, and after nearly all the items had been furnished, plaintiffs submitted an account of the same to the defendant, and that no objection was made to the account; that before suit was brought, defendant told witnesses that the engine and the other articles furnished by the plaintiffs were good and performed well; that defendant had used the same from the time of delivery; that defendant acknowledged to a witness who was authorized to present the account for payment, a short time before suit was brought, that it was all right, except a very small item of set off claimed by defendant for setting up the engine, and that defendant only craved a little more time on the

account; that the said defendant had from time to time during the progress and delivery of the various items in the account mentioned, made general payments thereon to the amount of three hundred and fifty dollars; that defendant set up no pretence that the articles were furnished in accordance with the written contract, set forth in defendant's answer; that partly by reason of great alterations in defendant's plans, and for other unavoidable reasons, none of the articles charged in the account were furnished within the time limited by the written contract, and very few of them were of the kind therein mentioned.

The court refused to receive testimony of the foregoing facts, and decided that this was not the right form of action; that the action should have been founded on the agreement set forth in defendant's answer; and that said answer was a bar to this action. Therefore, the court gave judgment against the plaintiffs, to which they excepted and took an appeal.

Under the Code, all technical forms of action and of pleadings are abolished; § 1733. Several causes of action may be united in the same petition, provided they affect all the parties thereto in the same capacities, and if suit on all might be brought in the same county; § 1751.

The petition in this case was founded upon an account, and a copy of the account is annexed to the petition, as required by § 1750. This account includes an item of \$600 for an engine, which was the subject of a written agreement. It also includes a long list of other items not included in the agreement, amounting to over \$300. The price of the engine, and the price per pound for castings are the same in the account and in the agreement. The agreement then supports the account. So far as they are concerned, independent of other evidence, there is no conflict or variance between them. But the account claims the price of many items not referred to in the written instrument, and which appear to have been furnished independent of that instrument. If, then, plaintiffs had a

cause of action growing out of the written contract, and also a cause of action for machinery and work furnished outside of that contract, it follows that they had two causes of action, and under § 1751 of the Code, both causes of action might be united in the same petition, and both be included in the same account on which the petition is founded. This would not preclude either party from using the contract as evidence of the stipulated price, &c., of the item or items designated by such contract.

The engine was charged in the account as having been furnished by the plaintiffs to the defendant. This assumes that their part of any contract in reference to said engine had been performed, and they accordingly sue for the price of the engine. They do not, it is true, sue on a special contract, or on special counts. They sue under the Code, by a general petition on account, as they might have sued at common law, on common counts.

It was decided in *Gibson v. Powell*, 5 Smedes and Marsh., 712, where the declaration contained a count upon a special contract, and also the common counts, and where the plaintiff failed to show a right to recover on a special count, that he might recover on the common count, where the case showed that if there had been no special contract, he might have recovered under the common counts. When we consider that this principle of pleading was decided at common law, the propriety of authorizing a recovery on a petition, under the Code, founded upon an account in harmony with the special contract, cannot be questioned.

In Massachusetts, it is held that when a special contract has been performed, so that an obligation to pay money is all that remains, a declaration on the common counts is sufficient; *Fulton v. Dickinson*, 10 Mass., 287. As the contract in the present case had been performed, so far as the plaintiffs were concerned, and as nothing but payment remained, it follows that plaintiffs might recover under a general petition.

Although it has been decided that in case of a special contract, the plaintiff cannot recover on a general count, still such is the case only when the contract is open and in full force; *Craimer v. Graham*, 1 Black., 406. If that doctrine is correct it could not be made appropriate to this case, for the obvious reason that this contract was not open and in full force. As shown by the bill of exceptions, the contract in this case had been in effect abandoned.

1. By having the plan of the engine materially changed.

2. By not being ready and willing to have the same set up on two different occasions when plaintiffs were ready, and offered to do so.

3. By acknowledging long after the contract, the correctness of the account on which the suit was founded, and which included the price of the engine furnished by plaintiffs.

In *Byrd v. Bertrand*, 2 Eng., 321, A, B and C, agreed with D in writing, under seal, that they would build a house for him, and have it completed by a certain day. They failed to complete the work by the time. It was then agreed by C and D, that C should go on and complete the work according to the specifications in the original contract. Held, that this was a new contract, but that the original contract was admissible in evidence to show the terms and stipulations of the new contract.

So in *Munroe v. Perkins*, 9 Pick., 298; after a special contract had been made, the defendant verbally promised the plaintiff that he should be paid for his labor and stock, and should not suffer, and under that promise he proceeded and completed the building. Held that plaintiff might maintain an action upon the parole agreement. See also, *Delacroix v. Bulkley*, 13 Wend., 71; *Shaw v. Lewiston Turnpike Company*, 2 Penn., 454; *Baldwin v. Farnsworth*, 1 Fairf., 414; *Reed v. McGrew*, 5 Ham., 380.

We find a case from Vermont particularly in point, in which a contract was made to deliver certain furnace

castings to a certain amount upon a credit of a year; and it was held that a refusal to receive a load of the castings, put an end to the contract, as to the obligation to deliver the balance, and also as to giving the stipulated credit for the amount delivered, and that an action might be sustained immediately for the amount delivered. It was also held that an action on book account, was the proper action; *Tyson v. Doe*, 15 Ver., 571.

Apply the principle of that case to this. At the time stipulated in the contract in this case, plaintiffs offered to deliver the engine and put it up, but defendant was not ready and refused to have it done. Again, in three months, a like offer was made and refused. After keeping the engine on hand three months for defendant, and he still refusing to take it, the plaintiffs had a right to regard the contract as rescinded, and were no longer under obligations to furnish the engine under that contract. It would be unreasonable to say that plaintiffs were required to keep the machinery on hand, without payment or interest for a longer period than three months. This act of itself then amounted to a rescission of the contract so far as any obligation on the part of plaintiffs were concerned.

A violation of a contract by one of the parties to a written agreement, is sufficient to authorize the other party to abandon it, and sue for the injury sustained; *Martin v. Chapman*, 6 Port., 344.

After thus rescinding the written contract, the defendant obtained of plaintiffs as appears by the bill of exceptions, a different engine from that described in the original contract, and expressed himself as well satisfied with its operation. This act also shows an abandonment of the written contract, and created a liability under a new parole contract. But it seems that this engine was furnished at the same price as that named in the written contract.

The third act of rescission of the original written contract, was at a still later period when defendant expressed

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himself satisfied with the plaintiffs' account, which included the item of the engine.

Under the foregoing views, it clearly follows that the court below erred:

1. In deciding the testimony to be inadmissible.
2. In deciding that this was not the right form of action.
3. In deciding that the action should have been founded on the original written agreement.
4. In deciding that defendant's answer was a bar to plaintiffs' action.
5. In rendering judgment against the plaintiffs.

Judgment reversed.

Stephen Whicher, for appellants.

J. Scott Richman, for appellee.

Fouts v. The State.

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The words, "with malice aforethought," are necessary in defining murder, either in the first or second degree, and in order to charge murder in the first degree, the indictment should also allege the killing to have been "willful, deliberate and premeditated," or that it was done in perpetrating some one of the crimes enumerated in § 2569 of the Code.

The distinction between murder in the first and murder in the second degree under the Code, defined.

An indictment alleging the killing to have been "willfully, feloniously and unlawfully" done, and also "with malice aforethought," is not sufficiently descriptive of the crime of murder in the first degree, but it is sufficient for the crime of murder in the second degree.

An indictment for murder in the first degree is not good, unless it shows the murder to have been committed in some one of the methods specified by § 2569 of the Code.

A good indictment for murder at common law, will not include murder in the first degree, under the Code.

Where the statute uses descriptive language to define an offense, that language must be followed in the indictment, or words of the same meaning must be used.

The words "with malice aforethought" do not include nor mean the same as the words "deliberate and premeditated."

A prisoner cannot be made to suffer the penalties of murder in the first degree under an indictment which is good only for murder in the second degree, nor can the jury go beyond the indictment by finding the defendant guilty in a higher degree than he stands charged.

The court charged the jury that if a design to kill was formed, "at the time the blow was struck with the knife, it is a willful, deliberate, premeditated killing; and therefore murder in the first degree;" held, that this is erroneous; that in order to constitute murder in the first degree, the design should be formed before the blow was struck.

Where insanity is set up as a defense to murder, it should clearly appear that the defendant was laboring under such a mental delusion as irresistibly and uncontrollably forced him to commit the crime.

Insanity cannot be set up as a defense to an indictment, unless it appears that the defendant's mind, at the time of the offense, was so deranged that he did not know the nature of the crime, or that he was so really deluded that he did not know he was doing wrong.

Error to Warren District Court.

Opinion by GREENE, J. Pleasant Fouts, the plaintiff in

error, was indicted in Polk county, for the murder of his wife, Ruth Founts, August 9, 1854. The venue was first changed to Jasper, and thence to Warren district court, where the prisoner was tried and convicted of murder in the first degree. He was sentenced to be executed December 15, 1854, but before that day the writ of error which brought the case to this court was granted. Several errors are assigned, all of which may be considered under three heads.

It is contended in behalf of the prisoner, that the indictment charges the crime of murder in the second degree only, and cannot justify a verdict and sentence in the first degree. The indictment contains four counts. The first alleges that Pleasant Founts, &c., &c., "did willfully, feloniously, unlawfully and with malice aforethought, with force and arms, and with a certain knife, made of iron and steel, in his right hand then and there held, which knife has been destroyed or withheld by the said Founts and cannot be found, make an assault upon one Ruth Founts, then and there being in the peace of the state, and then and there willfully, feloniously, unlawfully and with malice aforethought with the knife in his right hand, then and there held, did strike, and thrust, cut and stab her, the said Ruth Founts, upon the neck and throat; and the said Pleasant Founts, with the knife aforesaid, by the striking, thrusting, cutting and stabbing aforesaid upon the neck and throat of her, the said Ruth Founts, did then and there give unto her, the said Ruth Founts, several, to-wit: two mortal wounds, one of the length of three inches, and of the depth of two inches upon the neck and throat of her the said Ruth Founts, of which mortal wounds, she, the said Ruth Founts, then and there in the county of Polk aforesaid, and in the township of Jefferson in said county of Polk, on the ninth day of August, in the year of our Lord one thousand eight hundred and fifty-four, did immediately die. And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said Pleasant Founts, did her, the

said Ruth Fouts, at the time and place aforesaid, and in the manner and by the means aforesaid, willfully, feloniously and unlawfully, and with his malice aforethought kill and murder against the peace and dignity of the state of Iowa, contrary to the statute in such case made and provided."

The second count is the same as the first, with a slight difference in reference to the wounds. It speaks of but one mortal wound, and describes that as being on the right side of the neck.

The third and fourth counts are also very similar to the first, only in reference to the wounds. The one describing only one mortal wound, as inflicted on the neck and throat. The other gives no description of the wounds, but charges that he struck, stabbed and cut her on the neck, throat and gullet.

We have quoted thus largely from the indictment and are thus explicit in reference to each count, so as to show whether it conforms sufficiently to the requirements of the Code in describing murder in the first degree. It will be observed that so far as the facts are charged; so far as the legal statement and descriptive words of the crime are given, each count is an exact copy of the first, and differs very slightly from that, only in locating and describing the wound from which death ensued.

The Code declares: "Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder;" § 2568. Each count in the indictment then, although very redundant in words, very fully, and amply describes the prisoner to be guilty of murder, for each charges him with having killed a human being with malice aforethought. The next point to be settled is whether it defines the murder in the first or only in the second degree.

Section 2569: "All murder which is perpetrated by means of poison or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate any

arson, rape or robbery, mayhem, or burglary, is murder of the first degree, and shall be punished with death."

Now, the question arises, can this indictment under any fair construction of words, or analogy of meaning, come within any specification of murder in the first degree, as defined by this section. The nearest approximation the indictment can make towards coming within the meaning of this section, may be found in the words: "Or any other kind of *willful, deliberate and premeditated killing*." "*Any other kind*," resembling in deliberate, premeditated willfulness, the act of murder by "poison," or "by lying in wait." At a glance, it must be seen that the indictment in this case describes no such "*deliberate, premeditated killing*," nor is the murder alleged to have been committed in connection with the perpetration of any arson, rape, robbery, mayhem or burglary." The nearest it comes to any of these, is in alleging the crime to have been willfully, feloniously and unlawfully done with malice aforethought. But this "malice aforethought," is an essential element to murder of the second degree as well as the first. Such malice, would however, be implied under any charge of murder as defined in § 2569, as of the first degree.

In this connection, it may be well to see how murder of the second degree is defined by the Code, § 2570. "Whoever commits murder otherwise than is set forth in the preceding section, is guilty of murder in the second degree, and shall be punished by imprisonment in the penitentiary for life, or for a term of not less than ten years."

This section, and this only, embraces the indictment in the present case. "Under §§ 2568, 2570, the indictment may be appropriately classed as defining the crime of murder in the second degree.

While the indictment would be good for the crime of murder in the first degree, at common law, and perhaps good in nearly every other state in the Union, where that crime is defined by statute, still, under the Code of Iowa, it cannot be considered as comprising that first of crimes, which

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exacts a forfeiture of life as its penalty. Under the Code of Iowa, it may be truly said, that our state has taken a very long stride towards the abolition of capital punishment. That severest penalty can only be inflicted in a very few well defined cases. That which would constitute a murder at common law, is not sufficient. A murder committed "willfully, feloniously and unlawfully," and also committed with "malice aforethought," is not sufficient. It must also have been committed under some one of the few and peculiar circumstances defined by § 2569, of the Code. To but few of the multiform cases of murder can the penalty of death be inflicted. Legislative intention is so obviously expressed on this subject, that there is no room for cavil. It is clear that a murder, charged under the circumstances, and motives designated by the indictment before us, is not a crime which our law makers could have intended to designate as a murder in the first degree. It is not charged to have been perpetrated by "poison" or "by lying in wait," or any other kind of willful, *deliberate* and *premeditated* killing; nor charged as being in any way connected with the crimes of "arson, rape, robbery, mayhem or burglary." If committed with mere malice aforethought, with any other of the long list of crimes, it is not murder of the first degree. It is not punishable with death. It is murder in the second degree, and punishable only by imprisonment. In order to present a case of murder in the first degree, it is obvious that the indictment should have charged in addition to the "malice aforethought," that the crime was committed willfully, deliberately and premeditatedly.

The Attorney General argues, that as the indictment makes every necessary averment to cover the crime of murder in the first degree at common law, and as the greater includes the less offense, the indictment covers the crime of murder in the first degree under the Code. True, the greater includes the less degree of crime, but it is not true that a common law indictment for murder in the first

degree, is sufficiently comprehensive to include the greater degree of crime as defined by the Code. It may include all in the second degree, but it cannot include the first, for the obvious reason that the Code requires more to establish that crime in the first degree than is required at common law. Under the Code, additional facts must be alleged, as shown by § 2569. In a case like the present, the indictment must find that the killing was "deliberate" and "premeditated," as well as willful and with malice aforethought. In this instance, then, the Attorney General seeks to reverse the rule, and include the greater in the less offense. While the indictment would comprise every case of murder in the second degree under the Code, it does not comprise any case of murder in the first degree.

Again, it is claimed for the State, that the words, "with malice aforethought," embraces in substance the words, "deliberate and premeditated." We have already shown that there must be this malice aforethought in murder of the second degree. In the first degree the same malice aforethought must appear, and it must also appear that the killing was deliberate and premeditated. It must appear that the *killing* was premeditated as well as the malice. Malice may be aforethought, prepense or premeditated, and still there may be no deliberate, premeditated purpose to murder. The one may grow out of the other, but still differ from the other as much as cause differs from effect. Malice long harbored and encouraged by perverse minds, may lead to a deliberate and premeditated determination to destroy the object of its malevolence. Again, malice aforethought may exist without the slightest pre-determination to commit a murder or an overt wrong, until aroused by some unexpected incident, when the passion gets the better of the man and he inflicts the deadly blow, which a moment before or a moment after he would not have done. In the one case an object is attained, revenge is satiated, until again aroused in the remorseless spirit towards some

other unfortunate victim. In the other, the culprit of impulse, regret, remorse and shame mark his brow, and prove that he would give worlds if he could restore the life he had taken in the heat of passion. Truly, the deliberate, premeditated murderer is worthy of death. He who rejoices in his deed of blood, he who is so far fallen below ordinary humanity, as to deliberate coolly on murdering a fellow being, is no longer worthy of social protection, and forfeits all claims to that life which he in his depravity would wrest from others. But he who murders without premeditation, and earnestly regrets his deed of rashness, has some claim upon humanity. His penitence should receive christian forbearance.

Hence, we say, this peculiar feature in our Code, in defining the degrees of murder, and in mitigating accordingly the degrees of penalty, is illustrative of progressive wisdom and of true Christian charity.

It is true as stated by the Attorney General, that the very words of the statute need not be followed, if words of the same meaning are used. But the great discrepancy between the indictment in this case and the law of murder in the first degree as defined by the Code, must be apparent to the most superficial inspection. In quoting from each, we have sufficiently illustrated their great disparity. Agreeable to the repeated ruling of this court in reference to indictments, this one cannot be supported by § 2569. When the question has been before us, we have uniformly decided that where the statute uses descriptive language to define a public offense, that language must be followed or words of the same meaning must be used. *State v Morse*, 1 G. Greene, 503; *State v Chambers*, 2 ib., 306; *Nash v State*, ib., 286. In many other cases we have in effect decided that the same language, or language substantially the same must be used.

We conclude, then, that the indictment in this case is good for murder in the second but not in the first degree; and therefore it follows that the prisoner can only be sen-

tenced to suffer the penalties of murder in the second degree.

But, we are told that the Code leaves that question to the determination of the jury. Section 2571, "Upon the trial of an indictment for murder, the jury, if they find the defendant guilty, must inquire, and by their verdict ascertain whether he be guilty of murder in the first or in the second degree." True, that question is left to the jury ; still, the jury cannot go beyond the indictment. They cannot find a person guilty of an offense greater than that with which he is charged by the grand jury. That section is only appropriate to an indictment good under the Code for murder in the first degree. If good in the first degree, it necessarily includes the second, as the less offense. But if the indictment is only good to the extent of the less offense, it cannot include the greater. The Code provides that, "On an indictment for a public offense, admitting of different degrees, the defendant may be convicted of such offense on any degree lower than that charged in form in such indictment;" § 2918. But clearly, a defendant cannot be found guilty of a higher degree of crime than that charged. The greater is not included in the less ; the minor cannot embrace the major. Therefore, an indictment for murder in the second degree, cannot justify conviction in the first degree.

Objections are urged to the instructions given by the court. The court charged the jury that, "The premeditation or intent to murder need not be for a week or an hour, nor even for a moment. If you believe there was a design and a determination to kill distinctly formed in the mind at any moment before, or at the time the blow was struck with the knife, it was a willful, deliberate and premeditated killing, and, therefore, murder in the first degree." This charge goes too far. Such a design to kill would show malice aforethought, for in that it is only necessary that there be a formed design to kill ; and such design may be conceived at the moment the fatal blow is given. But we

have already shown that our Code requires something more than this to establish murder in the first degree. It requires at least a little time to deliberate, to *pre-meditate* the killing. It is not consistent to say that a *previous* design to do a thing may be formed at the very time the thing is done. Still, such pre-determination may be inferred, from many circumstances, without direct proof. If the determination to kill was only aroused at the time the blow was struck; if it was only the instantaneous result of an aroused passion, it was not a "deliberate and premeditated" act. A fatal blow, struck under such momentary impulse, might be murder in the second degree, but not in the first, as already indicated in this opinion. This instruction, then, was erroneous; but only so in its application to the degree of the offense, and, therefore, will not justify a new trial. The effect of the error is removed by abating the judgment to murder in the second degree.

In this, as in too many other cases of murder, insanity was set up as a defense, and the court instructed the jury in these words: "Before you can acquit on the ground of insanity, you must be clearly satisfied that at the time the defendant committed the homicide, he was laboring under a mental delusion or monomania, such as irresistibly and uncontrolably forced him to commit the crime." In this we can see no error. If a man has reason sufficient to discriminate between right and wrong, in reference to the act about to be committed by him, and if the will to do the right is not overcome by some real delusion, clearly apparent, in reference to the object upon which the act is committed, he should be held criminally responsible. In *The Commonwealth v. Rogers*, 7 Met., 500, it was held that a party indicted is not entitled to an acquittal on the ground of insanity, if, at the time of the alleged offense, he had capacity and reason sufficient to enable him to distinguish between right and wrong, and understood the nature, character and consequences of his act, and had mental power sufficient to apply that knowledge to his own case. But a

party is not responsible for an act done under an uncontrollable impulse, resulting directly from mental derangement; or from the delusion of the party, amounting to a real and firm belief of the existence of a fact, which, if true, might show his criminal act to be justifiable.

In *Commonwealth v. Mosler*, 4 Barr., 264, it is decided that insanity will not constitute a proper ground of defense to a criminal accusation, unless it is shown to exist to such an extent as to blind its subject to the consequences of his acts, and deprive him of all freedom of agency; *People v. Pina*, 2 Barb., 566; *Freeman v. People*, 4 Denio, 9.

From the authorities, we conclude that insanity cannot be set up as a defense to an indictment, unless it appears that the defendant's mind, at the time of committing the offense, was so deranged that he did not know the nature of the offense, or that he was so really deluded that he did not know he was doing wrong. Upon this point, then, we think the instruction given by the court is not erroneous. But upon the other points already considered, the judgment of the court below will be set aside, and a judgment be rendered in this court for murder in the second degree, and the defendant will be punished by imprisonment in the penitentiary for life.

Judgment reversed.

Isaac Parish, C. Bates and D. O. Finch, for plaintiff in error.

D. C. Cloud, Attorney General, for the state.

COLE v. PORTER *et al.*

A demurrer should specify the precise ground of objection, and shew in what respect the pleading is claimed to be legally insufficient.

The Code directs execution sales to be made between nine o'clock in the forenoon and four o'clock in the afternoon ; but where a notice of sale fixed the time of sale as between the hours of two and five o'clock in the afternoon ; held, that a valid sale might be made under such notice, as it will not be presumed that the officer sold the property after the time directed by the Code.

It will be presumed that an officer has done his duty, till the contrary appears.

Appeal from Jackson District Court.

Opinion by GREENE, J. This petition was filed by Eli Cole against Pitman and others. Petitioner claimed to have purchased a certain lot in the town of Bellevue, under a mortgage sale, and by an agreement with the parties in interest, it was agreed that the purchase money should be paid over to that party in whose favor a certain suit pending in the district court might be decided.—Defendants' demurrer to the petition was sustained. The demurrer alleges two objections to the petition. 1. That plaintiff's case as stated, is insufficient in law to entitle him to the relief prayed for. 2. "Because it appears from the plaintiff's petition, and the exhibits thereto annexed, that the notice under which the alleged sale was made, and under which plaintiff claims, is illegal and insufficient in this, to-wit: Said property was advertised to be sold on the 9th day of July, 1853, between the hours of two and five p. m., whereas the law requires the sale to be made between the hours of nine and four o'clock of the same day, and that the petition further shows that the sale took place in compliance with said notice."

1. The first objection alleged in the demurrer, is so general that it cannot be entertained under the Code. Indeed,

it does not appear to have been relied upon by appellant's counsel. The Code abolishes demurrers for formal defects; and for substantial defects it requires the true grounds of objection to be set forth; § 1754. A demurrer should specify the precise ground of objection. It should show in what respect the pleading is claimed to be legally insufficient. The first ground of objection made by the demurrer strikes at random, and indiscriminately at the whole petition, and is in all respects too general to be entertained under the Code.

2. The only question raised by the second cause of demurrer, is in reference to the sufficiency of the notice in stating the time of sale. It appears, the appellant purchased the lot in question by virtue of a mortgage sale, as authorized by the Code. According to § 2075, such sales are to be published and conducted in the same manner as is required in the sale of like property on execution. Such a sale must be at public auction, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon; § 1908.

But the notice in this case designated the time of sale between the hours of two and of five o'clock P. M., thus extending the time one hour beyond the time directed by the Code, but still including two hours within which the sale is authorized. Such a sale should be made on the day and within the hours designated by the notice.

The notice, too, should be prepared in conformity to the Code. Still, we cannot think the slight departure complained of in this case is sufficient to vitiate the sale. It will not be presumed that the sale was made after four o'clock. It will rather be presumed that the officer did his duty by selling the property within the time directed by law. If the notice had named the hour or hours of sale entirely outside of the time fixed by law, the objection would have been well founded. But as he had two hours within which he could make the sale pursuant to the Code,

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as well as the notice, it will be presumed, till the contrary appears, that he sold the property within the legal time.

Every legal presumption should be that an officer has done his duty; *Dollarhide v. Muscatine County*, 1 G. Greene, 158; *McGuffie v. Dervine*, ib., 251; *Barney v. Chittenden*, 2 ib., 165. We conclude, then, that the court erred in sustaining defendants' demurrer, for the causes therein alleged.

Judgment reversed.

James Burt, for appellant.

Smith, McKinlay and Poor, for appellees.

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HUNT v. BENNETT.

An answer to a petition in replevin, after denying the averments of the petition, alleged in reference to the property described in the petition, "that he, the said defendant, is rightfully entitled to the property, and to the possession thereof;" held, that this allegation is not new matter, and amounts to nothing more than a cumulative responsive denial of plaintiff's rights, and need not be specifically denied, under §§ 1741 and 1742 of the Code.

Where an objection to pleadings was not first raised in the court below, it should not be entertained by the supreme court.

In an action of replevin, where the jury return a verdict, "We the jury find a verdict for the defendant of fifty dollars," it is not error in the court to refuse a judgment ordering the property to be restored to the defendant. Such a verdict is not inconsistent with plaintiff's right to the property.

Appeal from Muscatine District Court.

Opinion by GREENE, J. This was an action of replevin commenced by Joseph Bennett against Geo. W. Hunt, for two hundred pork barrels and other articles. The cause was submitted to a jury, who returned a verdict in favor of

the defendant for fifty dollars. The court rendered a judgment against the plaintiff accordingly, and adjudged that each party should pay his own costs. Upon the verdict, defendant's counsel moved the court for a judgment against the plaintiff, for the return of the property replevied; but the court overruled the motion:

1. A question is raised in this court in reference to the state of the pleadings, which does not appear to have been in any way decided by the court below. It is claimed that defendants answer set up new matter, under § 1741 of the Code, and that it amounts to an affirmative allegation, not responded to, and should therefore be taken as true; § 1742. The averment referred to is the concluding words of the answer, in which it says that he, the defendant, is "rightfully entitled to said property, and to the possession thereof." This is not new matter. It amounts to nothing more than a cumulative denial of plaintiff's right to the property and possession, by averring the right to be in defendant. The answer first denies the allegations of the petition, in which the plaintiff claims the right to the property and the possession, and in conclusion affirms that which amounts to nothing more than such denial. This cannot be considered new matter, requiring a specific admission or denial, for it is in itself nothing more than a responsive denial of the petition, in the form of an affirmative allegation.

It was held in *Pringle v. Phillips*, 1 Sandf., 292, that if the declaration allege title in the plaintiff, and the defendant plead any matter showing special title in himself, he must still traverse the plaintiff's title. The issue must be joined on the latter, and the defendant's special right, or property, will, as evidence, sustain him in his traverse.

The petition in the case at bar, claims the title to the property, and the right of possession to be in the plaintiff. The answer claims the same right to be in the defendant. The issue, then, is distinctly presented to the jury, to be deci-

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ded according to the evidence, whether the plaintiff or the defendant was entitled to the property.

Besides, this objection to the pleadings was in no way raised in the court below, and therefore should not be entertained in this court.

2. We now come to a point that was raised in the court below. It appears by the bill of exceptions, that the jury returned the following verdict: "We, the jury, find for the defendant fifty dollars." On this verdict defendant's counsel moved the court for a judgment for a return of the property replevied. This motion was overruled, and defendant took exception to that decision. This court is now called upon to render such a judgment as the court below should have rendered. That court rendered a judgment in accordance with the verdict, and this court must do the same. From the verdict it can only be inferred that the plaintiff was entitled to the property he had replevied, by paying the defendant the sum of fifty dollars. This appears to have been the opinion of the district judge, before whom the evidence was submitted, as indicated by his overruling the motion, and by deciding that each party should pay his own costs; Code, § 1811.

If the jury had found the right of property to be in the defendant, it is to be presumed that they would have returned that fact in their verdict. As the verdict did not award a return of the property to the defendant, it may be inferred that they found that the plaintiff had a right to retain it. Such a verdict, at least, is not inconsistent with plaintiff's title to the property.

If defendant's counsel had reason to believe the verdict not in accordance with the evidence, an effort should have been made for a new trial.

If the verdict had been for the defendant generally, or for the defendant on the issue joined, he might with propriety claim a judgment *de returno habendo*, unless it appeared on the trial that the defendant was not

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entitled to the property, and in that event the court should direct the jury to correct or return a more specific verdict.

In *Johnson v. Howe*, 2 Gilman, 342, it was held that on a verdict for the defendant, he was not entitled to a writ *de returno habendo*, in an action of replevin, where *non detinet* was pleaded, and where defendant showed no title or right of possession in the property.

We infer from the ruling of the court below in this case, and from the verdict of the jury, that defendant showed no title or right of possession in the property, but showed that he was entitled to fifty dollars from the plaintiff for something connected with the property replevied.

As we have none of the evidence before us, we are not advised of the facts upon which the verdict is founded. But from the record before us, which shows no error, we must take it for granted that the verdict and judgment are correct.

Judgment affirmed.

Cloud and *O'Connor*, for appellant.

Stephen Wheeler, for appellee.

Carson v. Harris,

CARSON v. HARRIS.

A steamboat, as carrier, received boxes of goods in apparent good order at Galena, and delivered them to the consignee at Dubuque, on the same day in like apparent good order. On opening the boxes, it appeared that the goods had been wet a day or more before they were shipped on the steamboat; held, that the consignee had no right to set off the damages against the bill of the carrier, for the charges advanced and the freight; that the external appearances of the boxes, at the time they were delivered to the carrier, was not a true test of the internal condition, nor was the bill of lading conclusive that the goods inside of the boxes were in good condition.

Where one common carrier receives goods from a forwarding merchant, in apparent good order, and subsequent to the delivery to the consignee, it appeared that the goods had been previously wet and injured by some other carrier; held, that the carrier who last received the goods was not liable for the injury they received while they were in charge of a previous carrier, with whom he had no connection.

A carrier, who receives goods to carry for hire, is bound to take due care of them in their passage, to deliver them safely and in the same condition as when they were received by him; or in default thereof, he is liable to the owner to make adequate compensation for any loss or damage which may happen to the goods while in his custody; but he is not liable for any loss the goods may have sustained before they came into his charge.

The public good requires the courts to relax nothing from the common law responsibility of carriers.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This action was commenced before a justice of the peace, by D. S. Harris against W. C. Carson, to recover \$35 88, the amount of freight and charges on three boxes of merchandise. Defendant filed a set off of \$12 00 for damages sustained to the goods while in transition from New York to Dubuque. This item of set off was allowed by the justice of the peace, and judgment rendered for the balance in favor of plaintiff. Plaintiff appealed to the district court, where he obtained judgment for the full amount of his claim. Defendant appeals,

and still claims that his item of set off for damages should have been allowed by the court below.

We will briefly state the facts in the case, as we gather them from the bill of exception. It appears that the boxes were shipped from New York in the spring of 1853, and marked "W. C. Carson, Dubuque, Iowa," "Keep dry," and were sent by the usual lines of transportation, from one carrier to another, by the way of the lakes to Chicago; thence by railroad to Rockford, and thence by wagon to Galena, and were then delivered to G. W. Campbell & Co., forwarding merchants; that they were then shipped in the usual course of freight on board the steamer *West Newton*, D. S. Harris captain; that Capt. Harris paid charges and signed the usual receipt or bill of lading for the same, as being in good order and condition, and undertook to deliver them in like good order to W. C. Carson, at Dubuque; that said boxes were delivered to the agent of said carrier, and by him to said Carson, at his store; that Carson's clerk opened the boxes containing writing paper, and found the same to be wet and damaged; that the damages amounted to the sum of twelve dollars, which Carson claimed to have deducted from Harris' freight bill; that the boxes were received by Harris in apparent good order on his steamboat, were stowed by him in a safe and dry place, and delivered at Dubuque on the same day, and that from the appearance of the contents of the boxes, they must have been wet as much as forty-eight hours before they were delivered at Dubuque, and could not have been wet while upon the boat. Under the foregoing facts, the court decided that the plaintiff was not liable, and was entitled to amount of charges advanced by him, and to his freight bill.

The fact was conceded, that Harris was in no way connected with the carriers who had transported the goods to Galena, and that he paid previous charges upon the goods to the amount of thirty-three dollars. The bill of exceptions shows that the goods could not have been injured while they

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were in transit from Galena to Dubuque. It appears, then, that Harris complied with the conditions upon which he received the goods. He received them in apparent good order, and undertook to deliver them in like good order. The external appearance of the boxes was not a true test of their internal condition; nor is a bill of lading, signed by a common carrier, conclusive evidence that the goods were in good condition. As Harris was not connected as a partner with the other common carriers, through whose hands the goods had passed, and as it appears, the goods were not damaged after they were received by him, but were delivered to the owner in the same apparent good order that he received them, he should not be held responsible. The damage should be paid by that carrier who suffered the goods to be injured while they were in his possession, and not by him who had promptly and faithfully performed his undertaking, in delivering the boxes in as good order as he received them. We find a case in *Brown v. Hilton*, 11 Ohio, 303, which confirms our views of this case. It is decided in that case, that a common carrier, who receives goods in the ordinary course of business, and in the proper line of transit, has a lien for the freight and charges paid, although the goods may have suffered damage before they reached him, while in the hands of some prior carrier.

It would seem a self-evident proposition that one man should not be answerable for the faults of another, when they are in no way connected with the transaction. This truly catholic principle should pervade every department of the law, and every avenue of business life. To this principle there should be no exception. It is applicable to all pursuits and conditions in life. It is applicable to common carriers. A common carrier, who receives goods to carry for hire, is bound to take due care of them in their passage, to deliver them safely, and in the same condition as when they were received by him; or in default thereof, he is liable to the owner, to make adequate compensation for

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any loss or damage which may happen to the goods while in his custody. But he is not liable for any damage the goods may have sustained before they came to his charge. He is not liable for the damage they received while they were in the custody of the consignee, or some other common carrier, with whom he was not interested.

It is urged that the public good requires courts to hold common carriers to a strict accountability. True; and let them be so held, for any negligence of their own, their agents and employees. But this object is not accomplished by holding one carrier responsible for the negligence of another.

The highest considerations of public policy demand that there be no relaxation of the common law responsibility of common carriers. The experience of past generations, and the trying experience of the immensely extended commerce and trade of the present day, demonstrate the necessity and wisdom of firmly adhering to common law regulations. Now that steamboats and railroad cars contain so much of the population and wealth of the world, and have so completely monopolized all public avenues and thoroughfares of the country, there is nothing in which the people have a deeper interest, than a safe and reliable management of such public conveyances. Those who have charge of them should be steadily admonished of the high moral and legal obligations resting upon them. Thousands of lives, and millions of property are yearly sacrificed, by land and by sea. These appalling losses, with alarming frequency, are traced to the want of due diligence on the part of those who are entrusted with so much. Public preservation, renders it necessary to attach heavy pecuniary responsibility to the carrier, for the result of every act of negligence, or want of diligence. They should therefore be required to furnish safe conveyances, and to employ competent and careful agents. While we would gladly co-operate to enforce such regulations, we would at the same time say, that no carrier should be

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held accountable for damages occasioned by another, with whom he was in no way connected.

The record in this case discloses no error, and so far as we can arrive at the facts, as set forth in the bill of exceptions, we must conclude that the court below decided correctly.

Judgment affirmed.

Samesale and Vandover, for appellant.

Louis A. Thomas, for appellee.

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BREWER'S ESTATE et al. v. CROW et al.

Where a mortgage is annexed to the petition, and it is not denied by the answer, it is not necessary to prove its execution.

Where a written agreement is set out in the pleadings and recognized, it is not necessary to prove it.

Where a mortgage is recorded without the certificate of acknowledgement, the record of mortgages should be admitted in evidence in behalf of a person not a party to the mortgage, to show that he did not receive record notice of it as a valid mortgage.

A mortgage may be received in evidence against a third party, without proof of its being duly executed, acknowledged and recorded, if such party had actual notice of it, and consented that it might be executed upon the property in which such party was interested.

V. sold property to B and took a deed of trust. B. gave a mortgage to R, and about a year after V. signed a contract to R., agreeing that R. might furnish certain mill improvements upon the property, and have a lien therefor, but the contract did not in any way refer to the mortgage; held, that such contract did not show actual notice, or a notice of the mortgage.

Appeal from Des Moines District Court.

Opinion by GREENE, J. The petition was filed in this case by *Crow, McCreery & Co.*, to foreclose a mortgage

against Peter Brewer, Henry M. Vance and T. L. Parsons. The mortgage was executed by Peter Brewer and wife, to B. F. Roe, who assigned to the plaintiffs. Brewer's answer denied the indebtedness, and set up a want of consideration. Vance answered that he agreed to let Roe have a lien upon the premises in consideration of certain materials which he was to furnish for a mill, and that the materials had not been furnished. Replication denied the averments of both answers. At the next term of court Peter Brewer's death was suggested, and David Deardoff, as his administrator, was made a party. A supplemental answer was then filed by Vance, denying the averments of the replication, and alleging that Brewer was still owing him purchase money to the amount of \$800 on the property, for which the mortgage had been given, and that for the payment of said sum the property had been sold under a deed of trust, executed by said Brewer and wife; that by virtue of said deed of trust he, Vance, acquired title to the property; that he never made any contract, express or implied, by which said mortgage was recognized by him; that the agreement signed by him was for advances by said Roe made subsequent to the agreement, and that it was not intended in any way to authorize the mortgage given by Brewer to Roe.

The cause was submitted to a jury, who returned a verdict in favor of the plaintiffs for \$435 81 against the estate of Brewer, and found that certain lots described in the petition be held as lien against H. M. Vance, for the payment of \$385. Upon this verdict a judgment was rendered against the estate of Brewer, and a decree foreclosing the equity of redemption to the property.

1. The first objection urged to the proceedings below is that the mortgage was received in evidence without proof of its execution. As the mortgage is annexed to and made a part of plaintiff's petition, and as the execution of it was not denied by the answers, it was not necessary to prove it.

We conclude, then, that the court did not err in admitting the mortgage in evidence.

2. It is also urged as error that the court admitted in evidence the agreement between Roe and Vance, without requiring proof of the signatures. As that agreement is set out in the pleadings, and especially referred to and recognized by Vance in his supplemental answer, it was not necessary to prove it. When a written agreement is thus set out in the pleadings, and recognized by them on both sides, it is not necessary to prove the signatures.

3. It appears by the third bill of exceptions, that after the plaintiffs had closed their testimony, defendant offered to introduce the record of mortgages for the county of Des Moines, to show that the mortgage given in evidence by plaintiffs had not been recorded with the certificate of acknowledgment, and to show that no more than the body of said mortgage had been recorded, without the certificate of acknowledgment. The court refused to admit the record in evidence, and to this defendants excepted. So far as Brewer's estate was concerned, this ruling of the court cannot be deemed erroneous. The mortgagor and his estate were bound by the mortgage, whether it was recorded or not. But Vance was not a party to the mortgage, consequently his rights could not be affected by it, unless he had actual notice of it, or unless the mortgage had been acknowledged and recorded, as required by law. The fact that the mortgage was recorded without any acknowledgment, could not impart notice to him that a valid subsisting mortgage had been legally executed by Brewer, to the property in which he was interested, and to which he acquired title by virtue of a deed of trust. We think, then, that so far as Vance's rights were concerned, the record should have been received as evidence, in order to show that he could not be charged with notice of the mortgage from the record.

4. In behalf of Vance, the following instruction was asked and refused: "That the mortgage offered in evidence to the jury, and sought to be foreclosed, is not evi-

dence as against Vance, until the execution of the same by Brewer has been proved, either by Vance's admission, or by the proof of the signature, or by the same having been properly acknowledged and recorded." The court correctly refused this instruction, for the reason that the mortgage might have been used as evidence against Vance, if he had *actual* notice of it; if he consented that the mortgage might be given on the property in which he was interested, and if its execution was admitted by the pleadings. It is claimed that the agreement executed by Vance to Roe, authorized the mortgage, and we infer from the instructions given and refused that the court below gave too much importance to that agreement. It is dated nearly a year after the mortgage was given, and makes no reference to that instrument. It merely stipulates that Roe shall hold a lien for all monies, materials and labor, paid for by him in building a mill on the land which Vance had sold to Brewer for that purpose, and Roe agreed to furnish the materials accordingly. The agreement refers merely to such things as Roe might pay for or furnish. It cannot therefore be considered, that this agreement shows that Vance had notice of the mortgage, that he assented to it as a prior incumbrance to his deed of trust. We conclude, then, that the decree so far as it affects Vance, should be reversed.

Judgment reversed.

M. D. Browning, for appellants.

David Rorer, for appellees.

RYNEAR AND WIFE v. NEILIN.

On the return of a procedendo from the supreme court, in which a petition in chancery was declared to be without equity; held, that the district court did not err in granting complainant's motion to dismiss his petition without prejudice.

Appeal from Johnson District Court.

Opinion by GREENE, J. Jonathan Rynear and wife instituted an action of trespass, *quare clausum fregit*, against Patrick Neilin. Neilin thereupon filed his petition for an injunction to stay proceedings in the trespass suit, and to have a deed of conveyance, given by him to B. S. Rawling, under whom Rynear claimed, canceled and made void. The action at law and the proceedings in chancery were consolidated, and the court below decided that the deed from Neilin, under which the Rynears claimed, should be canceled and held for naught, and that the land should, by the decree, be restored to Neilin in fee simple. The case was taken to the supreme court by Rynear and wife, and the decree reversed. This court decided, that Neilin's petition did not present such a case as entitled him to relief in equity. ^(a)

On return of the case by *procedendo* to the court below, Neilin moved that his petition might be dismissed without prejudice. This motion was granted. Rynear and wife appealed, and claim that the court erred in granting the motion.

As the cause was returned to the district court for a trial *de novo*, in accordance with the decision of the supreme court, and as that court decided that there was no equity in complainant's bill, we think the motion to dismiss was correctly granted. The opinion of this court effectually disposed of the petition. It contained no equity, and con-

(a) See *Rynear v. Neilin*, 3 G. Greene, 310.

sequently there was no further service for it in a court of chancery. Neilin was not called upon to submit to the costs of a new trial, so long as that new trial could avail him nothing. The Ryneers had no cause to complain, if Neilin was so far defeated in the supreme court as to be disabled from proceeding further against them. Complainant had a right to do that voluntarily, which the respondents were striving to force upon him. They had no reason to complain if he concluded to discontinue proceedings against them.

A complainant, at any time before an interlocutory or final decree in the cause, has a right to have his bill or petition dismissed upon payment of costs. 8 Paige, Oh: R., 79; 9 ib., 245; 8 Ham., 214; 2 Blackf., 232; 3 Scam., 370.

This practice is also sanctioned by the Code, §§ 1801 to 1805.

But it is said, the court went too far in granting this motion *without prejudice*. In this we see no violation of a sound legal discretion. This practice is common, and often necessary to subserve the ends of justice.

Judgment affirmed.

Smith, McKinlay and Poor, for appellants.

Cook and Dillon, for appellee.

Zumhoff v. The State.

ZUMHOFF v. THE STATE.

Those provisions of the Code which prohibit the sale of intoxicating liquors, by the glass, are not unconstitutional.

In an indictment against an individual for retailing intoxicating liquors by the dram, it is not necessary to designate the premises upon which the alleged sale was made. It is sufficient if the offense is charged to have been committed in the appropriate county. It is desirable, though not essential, that the town or city be designated.

Where an indictment is in substantial compliance with § 2916 of the Code, it cannot be deemed invalid.

An indictment for retailing intoxicating liquors charged the defendant with being "a retailer of intoxicating liquors by the glass or dram, to be there and then drank, in and about the premises of him, the said William Zumhoff, by consumers and purchasers thereof; and did then and there on divers different and separate times, retail to divers persons, to the jury unknown, twenty glasses or drams of rum, brandy, gin, whiskey and wine, and other intoxicating liquors," &c.; held, that the offense is charged sufficiently specific, and with more descriptive and explanatory matter than is necessary under the Code.

When the offense is charged as defined in the first division of § 925 of the Code, it includes within its meaning that which is described after the word "prohibited" in the last division of this section.

Where an indictment charges that the defendant had retailed twenty glasses or drams of intoxicating liquors to divers persons, at divers times, it does not thereby present more than one offense, as limited by § 2917 of the Code.

Error to Dubuque District Court.

Opinion by GREENE, J. An indictment was returned by the grand jurors of Dubuque county against William Zumhoff, for retailing intoxicating liquors by the glass or dram, contrary to § 925 of the Code. Defendant demurred to the indictment, assigning several causes for demurrer. The demurrer was overruled, and judgment rendered against the defendant.

It is now alleged that the judgment is erroneous, for the reasons assigned in the demurrer.

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1. Because the act under which the indictment was found is an unwarrantable and unconstitutional exercise of legislative power. As this point was sufficiently considered in *Our House No. 2 v. State*,^(a) at the June term, 1853, of this court, it will not now be discussed. In that case it was decided that those provisions of the Code which prohibit the sale of intoxicating liquors by the glass, are not unconstitutional. We so decide in this case.

2. It is claimed that the indictment does not state the place where the alleged offence was committed with sufficient certainty, nor designate the precise locality of the premises upon or within which the alleged violation of law took place. After giving the county and state, and stating the residence of defendant as being of Dubuque, in the county and state aforesaid, it charges that defendant at Dubuque, in the county and state aforesaid, did presume to be, and was a retailer of intoxicating liquors, by the glass or by the dram, to be then and there drank, in and about the premises of him, the said William Zumhoff," &c. It states the city, the county and the state in which the alleged sales were made, in violation of law. This is sufficient. In an indictment against an individual for retailing intoxicating liquors by the glass or by the dram, it is not necessary to describe the premises. If the offense is alleged to have been committed within a designated town or city, in the appropriate county, it is sufficient.

The Code declares that no indictment shall be quashed if it can be understood that the offense was committed at some place within the jurisdiction of the court; § 2916. Accordingly, if the venue is appropriately set forth, or if the offense is alleged to have been committed within the county for which the presentment was made, it is sufficient. It is not necessary to designate the town or city. But as incorporated towns and cities are invested with more or less power to regulate the traffic in liquor, it would seem

(a) *Ante*, 172.

more appropriate to name the town or city in the indictment; still, this is not essential to the validity of such an indictment.

If the indictment is against the premises, or the "dram shop," in which the unlawful sales are charged to have been made, the place should be described so as to be readily known or ascertained, in order to abate the nuisance.

3. It is urged that the indictment does not show that the same was found by a grand jury duly impaneled according to law, and does not state the time when it was found. It appears by the record in the case, that "on the second day of April, A. D. 1853, the grand jury, by their foreman, C. H. Booth, presented to the district court of Dubuque county, then in session, the following indictment for selling liquor." Then follows a copy of the indictment, setting forth the proper venue, term of court, and that the grand jurors in and for said county, duly selected and impaneled, upon their oath present," &c. As the county and state are distinctly named in the margin at the commencement of the indictment, and the county referred to as "said county," and the indictment avers that the grand jurors were duly elected, impaneled and sworn, we think this objection is without foundation. The indictment is in substantial compliance with § 2916 of the Code, and therefore cannot be deemed invalid.

4. The indictment does not allege any specific offense, and does not contain a sufficient information of the accusation against defendant. In reply to this, it is only necessary to say that the offense is averred in the language of the Code. It charges defendant with being a "retailer of intoxicating liquors by the glass or by the dram, to be then and there drank, in and about the premises of him, the said William Zumbhoff, by consumers and purchasers thereof, and did then and there, on divers different and separate times, retail to divers persons, to the jurors unknown, twenty glasses or drams of rum, brandy, gin, whiskey and wine, and other intoxicating liquors," &c. The section of the Code which defines the offense, simply

prohibits the retail of intoxicating liquors by the glass or by the dram, § 925. It follows, therefore, that the indictment in this case, contains more words than are necessary to define the offense. It not only avers all that was necessary under the Code, but it also contains much descriptive and explanatory matter, which may be treated as surplusage, which will not vitiate an indictment. The section of the Code last referred to declares, "the retail of intoxicating liquors, in the manner which is commonly denominated 'by the glass,' or 'by the dram,' is hereby prohibited." This portion of the Code explicitly defines the act which is prohibited. Then follows in the same section that which makes the sale of liquors in larger quantity than by the dram, "with a view to their being drank on or about the premises, as a selling by the dram within the meaning of this section." The offense may be completely charged without any reference to this last clause of the section. It may be charged in the few words contained in the first division of the section, without any reference to what follows, and still be a perfect indictment, and comprise within its meaning the sale of liquor in any quantity, with a view to their being drank on the premises, as described in the latter division of that section after the word "prohibited."

5. It is next objected that the indictment does not conclude properly. It avers that the offense was committed by the defendant "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state." It is claimed that as the offence charged is under a penal statute, the indictment should conclude by a specific reference to the statute under which the same was found. We can discover no reason or authority for this objection. The offence is created by statute, and when it is alleged to have been committed contrary to the form of the statute, it is sufficient. The body of the indictment, in describing the offence, sufficiently refers to that portion of the statute which is averred to have been violated, and it concludes

in the usual form. It refers to the "statute in such case made and provided."

In *United States v. Gilbert*, 2 Sumner, 19, it was held that the conclusion of an indictment "against the form of the statute"—in the singular—is sufficient in all cases, even where the offence is distinctly within more than one independent statute. So a conclusion "against the form of the statutes," in the plural, would be good, even if the offence was punishable by a single statute only.

In *Fuller v. State*, 1 Blackf., 63, it is decided that an indictment should conclude *contra formam statuti*, when the statute creates an offence which did not exist at common law.

6. It is objected that the indictment avers more than one offence in the same count; that it alleges the sale of twenty glasses or drams, to divers persons at divers times, and therefore shows different offences. To support this objection, reliance is placed on § 2917 of the Code. "An indictment must present but one public offense, but such offense may be therein charged in different forms to meet the evidence in the case."

The offense presented by the indictment in this case is no departure from the above section. It charges but one public offense, and that is, "the retailing of intoxicating liquors by the dram." It matters not whether the defendant retailed one or twenty drams, the offense is still the same, and in violation of the same section of the Code. In the one case a mild penalty would be called for, and in the other a heavier fine, or both fine and imprisonment, according to the extent and flagitious character of the offense. If long continued and under atrocious circumstances, the severest penalty of the law should be enforced.

The indictment in this case alleges the offense to have been committed as a continuous traffic, "on divers occasions to divers persons," and still it presents only the one offense; the retail of intoxicating liquors by the dram. (a)

(a) *Our House No. 2 v. State*, Ante 172.

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The offence charged is of a continuous character, carried on from day to day, and although the unlawful traffic is alleged to have been continued for several days or weeks prior to the commencement of the prosecution, it must still be regarded as but the one offence, made the more enormous by its long continuance, and requiring the more exemplary punishment.

The object of the law is to prohibit the retail traffic in intoxicating liquors; and it is the imperative duty of the officers of the law to see that object effectually and faithfully secured. Very different views may be honestly entertained in reference to the expediency or propriety of the law, but no difference of opinion should prevail as to the duty and necessity of maintaining the dignity and majesty of all laws. Every man, whether in public or private life, should unite in requiring a strict enforcement of all laws enacted for the preservation of life, property, peace and prosperity.

Courts are especially called upon to overlook slight technical objections, to disregard popular prejudices, and to so construe statutes and adjudge causes, that the avowed objects of the legislature for the public good may be respected and enforced. To this end, an indictment in substantial compliance with the statute upon which it is framed, should not be deemed insufficient, however defective it may be in mere matters of form, which cannot prejudice the rights of the accused. The indictment at bar is by no means perfect in form, still it is good in substance and contains no defect that can prejudice the rights of the defendant. For that reason the court below very correctly overruled the demurrer.

Judgment affirmed.

J. Burt, for plaintiff in error.

D. C. Clond, Attorney General for the state.

McEwen v. Taylor.

MCEWEN v. TAYLOR *et al.*

Where a license to keep a ferry does not give to the ferryman the exclusive privilege for a certain distance above and below his ferry, he cannot sustain an injunction against parties who may cross passengers in a skiff within that distance; especially if the petition does not allege that they had no license to keep a skiff ferry, and does not aver that they took pay for crossing passengers.

Appeal from Keokuk District Court.

Opinion by GREENE, J. The petition was filed in this case by David McEwen, for an injunction against Andrew Taylor and Benjamin Hollingsworth. It sets forth that on the 15th of April, 1851, the petitioner was duly licensed to keep a ferry across the south fork of Skunk river in Keokuk county, by the board of commissioners of said county; that said privilege extended two miles above and two miles below the point designated for the ferry; that he prepared and kept said ferry in strict accordance with the license; that the defendants had been in the constant habit, during the previous year, of keeping a skiff and canoe to carry persons across said river at a point within two miles of complainant's ferry; that the persons who are thus ferried or crossed, are not the owners of a mill or their customers; that he cannot say how much money they have received for such crossing; that the number of persons who cross the river at their point is increasing every day; that they aver their determination to continue the running of said boat and declare their determination to build a boat within a short time, and to use the same so as to pass teams and horses as well as footmen; that unless they are restrained, they will continue the said crossing, build said boat to engage in ferrying generally, and do such injury to the rights of said plaintiff, that he will have no adequate remedy. The petition concludes in the usual form, with a prayer for an injunction which was granted.

To this petition, defendants' filed a demurrer which was sustained, and the injunction dissolved. The only error assigned is, that the court sustained the demurrer.

The license from the county commissioners, a copy of which is annexed to the petition, shows that plaintiff was authorized to keep a certain ferry at a point designated, for five years from the 14th day of April, 1851; the said license to extend two miles above and two miles below, said point. The license does not give him the *exclusive* privilege. It is not an *exclusive* license. It merely permits the plaintiff to keep a certain kind of ferry at the point and within the limits named, for the term of five years. As it confers merely the authority to keep the kind of ferry described in the license, without making that authority or franchise exclusive, and as the petition does not aver that the defendants had not a license to keep a skiff or canoe ferry, and as the petition does not aver that they crossed passengers in their skiff or canoe for pay, we think the court did not err in sustaining the demurrer. If the license had been granted to the plaintiff with an exclusive privilege for two miles above and two miles below, he might then sustain an injunction against parties who should in any way cross passengers within the space designated, to the injury of his franchise.

Such exclusive privilege cannot be inferred; it should be expressed in the license or charter, and if not so expressed it cannot be enforced. If it had been so expressed in the license before us, we should have reversed the decision, and sustained the petition, although it does not show that defendants crossed passengers for hire. As it is, we are constrained to the opinion that the court below ruled correctly.

Judgment affirmed.

Geo. G. Wright, for appellant.

Charles Negus, for appellees.

Taylor v. Brobst.

TAYLOR v. BROBST.

Constructive service, by publication, is not good, unless ordered by the court, after the return of the notice, "not found," to the appearance term of the court.

Where the defendant did not receive personal service, nor appear, in addition to the constructive service by publication, it should appear of record that a copy of the petition was directed to him through the post office, as required by the Code, § 1826.

Appeal from Monroe District Court.

Opinion by GREENE, J. December 14, 1852, Joseph Brobst filed in the district court of Monroe county, his petition against John H. Taylor, to foreclose the equity of redemption to certain lands sold for the taxes of 1851.

The original notice was returned, "not found," on the 23d of the same month. During the month of January following, notice of the proceeding was published in a weekly paper. On the 8th of February, at the first term of court after the proceeding was commenced, it appears that the cause came on to be heard, and proof of publication by affidavit was made, and the court ruled that the defendant plead by the next morning. The defendant failing to plead by that time, judgment was rendered against him by default, and a decree to close and bar the equity of redemption was granted. Several objections are urged to the proceedings, on points of law which have been so often disposed of that we do not deem it necessary to consider them. And it is only necessary to advert to those points in the case upon which the decision in this court must turn.

1. It appears that the original notice was not returned to the next term, and that the notice by publication was not

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authorized by the court. It has been decided by this court in *Pinkney v. Pinkney* and in *Lot Two v. Sweetland*,^(a) that notice by publication cannot be considered good, unless authorized by the court after the return of the original notice to the appearance term therein designated.

The record in this case clearly shows that the court had not acquired legal jurisdiction over the person of the defendant.

2. The court rendered judgment by default, without requiring proof that a copy of the petition and notice had been directed through the post office to the defendant, as required by § 1826 of the Code. Such proof was essential to the exercise of jurisdiction over the defendant. In *Broghill v. Lash*, 3 G. Greene, 357, this court decided that where service of notice has been made by publication only, default should not be entered without proof that a copy of the petition and notice was directed to the defendant at his usual place of residence, or that his residence could not be ascertained; and that such proof will not be presumed, but should appear of record.

This proof, in cases where there has been no personal service or appearance, is made an essential element of jurisdiction by the Code, § 1826, and therefore the court should require it before entering a rule or judgment of default against the defendant, and the record in such a case should show that this element of jurisdiction had been supplied. Where constructive service is made to take the place of actual personal notice or appearance, such service should not only be made apparent of record, but it should also appear that such service was made in substantial compliance with the Code. The record in the present case shows no such compliance. On the contrary, it shows that these essential requirements of the Code were not performed, and therefore shows *prima facie*, that the decree of foreclosure was *coram non judice*, and void. The cause will therefore be remanded to the district court, with the hope that that

(a) *Ante* pp. 324, 465.

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court will acquire either actual or legal constructive jurisdiction over the person of the defendant, before rendering any judgment or decree against him.

Decree reversed.

J. E. Neal, for appellant.

A. W. Curtis and *Wm. Loughridge*, for appellee.

MORGAN et al. v. McLAREN.

A verbal contract for two lots, to be paid for in printing and cash, is within the statute of frauds, if no part of the stipulated price had been paid, and if the vendee did not acquire possession of the premises.

Where C., as executor of the estate of P., was garnisheed, and answered that P. was indebted to M. K. & Co. in the sum of \$140; that M. had verbally contracted to buy two lots of P., and to pay \$300 for them, half in printing and half in cash; that the bill of M. K. & Co. was to go in part payment; that "in case the balance of said purchase money is not paid, and I should conclude to rescind the contract and receive back the two lots, then the estate will be owing about the amount of one hundred and forty dollars;" held, that the court was justified in rendering judgment against the garnishee, to be paid by the estate.

Appeal from Des Moines District Court.

Opinion by GREENE, J. In this case, P. M. McLaren had obtained judgment against Morgan, McKinney & Co., and caused garnishee process to be issued against Joshua Copp, executor of the estate of F. J. C. Peasley. The executor's answer was, in substance, that he understood the estate to be indebted to Morgan, McKinney & Co., in a sum amounting to something over one hundred and forty dollars; "that J. M. Morgan purchased or contracted for two lots in Peasley's addition to the city of Burlington, for

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which he was to pay said Peasley the sum of three hundred dollars, one-half to be paid in printing, and the other half to be paid in cash; that the bill presented by Morgan, McKinney & Co. was to go in part payment; that there was no bond or deed given by Peasley for said lots; that it was a verbal arrangement between him and Morgan; that if the balance of the purchase money is paid within a reasonable time, he will be entitled to a deed for the lots; and in case the balance of said purchase money is not paid, and I should conclude to rescind the contract and receive back the two lots, then the estate will be owing about the amount of one hundred and forty dollars," &c. Upon this answer, judgment was rendered against the garnishee for the sum of one hundred and forty dollars, to be paid by the Peasley estate, and upon this judgment an appeal is taken.

It is claimed, that the answer shows that there was a valid subsisting contract for two lots, between Morgan, McKinney & Co., and Peasley, and that the one hundred and forty dollars should be applied in part payment of the two lots, and consequently should not be treated as an indebtedness from the estate. We could not deny the correctness of this position, if the answer showed that the verbal contract for the two lots had been made with Morgan, McKinney & Co., instead of James M. Morgan, and if it showed that the vendor had received a portion of the purchase money from them, or had placed the vendees in possession of the lots by virtue of the contract. It appears by the answer, that the contract was with J. M. Morgan alone, that he was to pay one-half of the price of the lot in printing, and the other half in cash. It is not pretended that any payment had been made upon the lots, or that Morgan was in possession. Consequently no evidence of this contract, in relation to a transfer of an interest in land was admissible in evidence, unless in writing, and signed by the party to be charged therewith. Even as between Morgan and Peasley, the contract is clearly within the statute of frauds;

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Code, §§ 2409, 2410, 2411. As the contract could not be treated as valid in its effects upon Morgan, *a fortiori*, it could not as to Morgan, McKinney & Co., who were a third party to the arrangement. The statement in the answer, "that the bill of Morgan, McKinney & Co. was to go in part payment," does not show that it was applied in part payment of Morgan's intended purchase, nor does it show that that firm agreed that their claim should be so applied.

The record does not show that this J. M. Morgan is even a member of the firm of Morgan, McKinney & Co.; but if he is a member of that firm it does not follow that the credits of that firm can be appropriated for the payment of his individual indebtedness, in preference to the indebtedness of the firm. But in this case there was no individual indebtedness from Morgan to the estate of Peasley. As the answer shows the transaction, there was no valid contract between the parties. Morgan could not enforce a specific performance against the estate for the lots, nor could the state sustain an action against Morgan for the price of the lots. There was no written agreement, no payment, no possession; and consequently there could be no competent evidence in reference to this real estate transaction.

We conclude, then, that there was no valid contract between Peasley and Morgan, McKinney & Co., in reference to the lots; that the answer shows the Peasley estate to have been indebted to that firm in the sum stated, and that judgment was correctly rendered against the garnishee.

Judgment affirmed.

Wm. Thompson, for appellants.

Browning and Tracy, for appellee.

Hall v. Hunter.

HALL v. HUNTER.

If an instruction asked, appears to be legally correct, the refusal of the court to give it will not be deemed erroneous, unless it appears to have been applicable to the case.

Where a purchase was made under an agreement to pay a certain amount at a future day, and to give a note for the same; and where the purchaser refused to give the note, the amount, in consequence of such refusal, cannot be considered as due before the time stipulated.

If a party agrees to give the note of a third party, in full payment of a balance due from him, and fails to deliver the note, as agreed, when requested, the amount may be sued for as a cash demand.

A party cannot sue for and recover money before it becomes due, even if the debtor refuses to give his note for the amount payable at the time stipulated.

A court is justified in refusing an instruction which is calculated to mislead the jury, although it may state a principle of law correctly; or the court may give such instruction in a modified form, so as to present the law applicable to the facts, more appropriately and intelligibly to the jury.

Where the evidence is conflicting, and where the court overruled the motion for a new trial, based, in part, upon the insufficiency of the testimony to sustain the verdict, this court will not disturb the judgment, unless it is apparent of record that there was no evidence before the jury upon some point in the case so material that, in the absence of proof upon it, the verdict could not be justified.

Appeal from Johnson District Court.

Opinion by GREENE, J. The transcript discloses but little of the history of this case. It appears that the suit was commenced before a justice of the peace. But it does not appear upon what the action was founded, or what issue was tried before the jury. The verdict of the jury in the district court informs us, "that the said Adam Hunter did not promise in manner and form as the said Green Hall hath complained against him."

The plaintiff filed a motion to set aside the verdict and grant a new trial. The motion was refused. In this, it is claimed the court erred, and eight reasons are assigned which we will briefly consider under three heads :

1. The court refused to give the following instructions, asked by the plaintiff: "That if the jury believe from the evidence, that Adam Hunter, the defendant, purchased the horse of the plaintiff, either in person or by his agent, and pay the balance of fifty dollars in a note due at a *future period*; and that on request, Hunter refused to give said note, the jury will find a verdict for the plaintiffs." If this proposition states the law correctly, it may still be questioned whether it was applicable to the case before the court. The record does not show the nature of the action, nor the issue submitted to the jury. A portion of the evidence is set forth in the bill of exceptions, but that does not sufficiently advise us of the true condition of the case and of the issue joined. This court decided in *Tryon v. Oxley*, 3 G. Greene, 289; that if the instruction asked, had even been a correct legal proposition, it would not have been error to refuse it, unless it appeared applicable to the evidence before the jury, and the merits of the case as presented by the parties. If the instruction asked was correct in law, we could not with propriety say that the court erred in refusing it, unless it appeared applicable to the case. By calling to our aid the alternative instruction given by the court, in place of the instruction refused, together with the evidence of record, it might be safely assumed that the instruction asked was not strictly appropriate.

The rejected instruction refers merely to a note due at a future period. The substitute given by the court refers to a note on a third person, and also to the parties' own note, payable at a future period, and instructs the jury correctly, clearly and appropriately under each description of note. Under the rejected instruction, the jury were directed to arrive at the same conclusion, whether the note was to be made by defendant, or to be the note of some third party. In this particular, it is vague and uncertain. If abstractly correct, we think the rejected instruction is not sufficiently explicit or sufficiently appropriate to render a new trial nec-

essary. But, is it correct? We think not. If correct, it is a principle that we have not yet discovered, and which we should be sorry to recognize as law. The instruction asks the court to adopt as law this doctrine: That where a man contracts a debt payable at a future day, and fails to give his note as agreed, he becomes at once liable to pay the amount, and suit may be maintained against him before the payment becomes due. We think it would be difficult to find any authority to sustain this doctrine.

The instruction asked, assumes that the failure to give the note for the amount due at a future day, would change the terms of the liability so as to make the amount due and payable *at once*. The plaintiff might, perhaps, in such case, sue specially for the note under the special contract to furnish the same, but he could not sue for the amount of the debt until the same became due.

2. The instruction given by the court below, in place of the one refused, is alleged to be erroneous. It was given to the jury as follows:

"That if they believed from the evidence that Adam Hunter, the defendant, purchased said horse of the plaintiff, either in person or by his agent, and was to give the two colts and the balance in a note of fifty dollars on a third person, which note was to operate as an absolute payment of said balance of fifty dollars, and the said Hunter refused to give said note on demand, that in that case they would find for the plaintiff; but if the jury believed from the evidence that the said balance of fifty dollars was to be paid at a future period, agreed upon by the parties, and that the said Hunter was to give his own note therefor, payable at said future period, and that the said Hunter refused to give his note, that in that event the said plaintiff was not entitled to recover; the said time for which the credit was to run not having expired." This instruction embraces all the law contained in the rejected instruction, and applies the law appropriately to two given statements of facts.

If the jurors found that Hunter agreed to give the note of some third person in absolute payment of the balance agreed upon, and if Hunter refused to deliver the note to Hall, on demand, then upon such failure to make payment as agreed, it became a money demand, and plaintiff might recover accordingly. This is upon the principle that a note payable in property becomes a cash note if the payor fails to make the payment at the time and in the manner specified. So this division of the instruction contemplates the facts that the demand was to be paid in the note of a third party, and that the defendant failed to make the payment as agreed, consequently it became at once a cash demand.

The other branch of this instruction simply announces the proposition that a man cannot sue for and recover money before it becomes due, not even if the debtor refuses to give his note for the amount. It is the very converse of the doctrine contained in the rejected instruction.

This, and the other instructions given by the court, appear to cover the entire case, and embrace all the law clearly stated and applied to the given facts. Without the rejected instruction the jury would be likely to arrive at a correct conclusion; with it, their views would most likely have been embarrassed, confused and uncertain.

A court is justified in refusing an instruction which is likely to mislead the jury, although it may state a principle of law correctly. Or the court may, as in this case, give the instruction in such a modified form as to present the law applicable to the facts more appropriately and intelligibly to the jury.

The great object in charging jurors is to instruct them in the law of the case, the most appropriately, concisely and clearly, so that they may have no difficulty in arriving at a legal conclusion upon the facts as they may find them. If a special instruction asked is calculated to defeat this object, it becomes the duty of the court either to refuse it unconditionally, or to give it under such modifications as

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would be likely to remove or correct that which might mislead the jurors. Such was the action of the district court in the case at bar, and we think it worthy of imitation in all similar cases.

3. It is objected that the court below erred in refusing a new trial, on the ground that the verdict was contrary to evidence. We have carefully examined the evidence set forth in the bill of exceptions, and cannot discover that it is so in conflict with the verdict as to justify a new trial. The district judge and jurors had the witnesses before them, and were in a better condition to judge of their credibility, and therefore much better qualified to weigh and reconcile the conflicting portions of testimony than those who did not see and hear the witnesses. In such a case we should be very reluctant to disturb the verdict, on the ground of insufficient testimony.

In a case like the present, where the evidence is conflicting, and where the court below overruled the motion for a new trial, based in part upon the insufficiency of the testimony to sustain the verdict, this court will not disturb the verdict, unless it is apparent, of record, that there was no evidence before the jury upon some point in the case so material that in the absence of proof upon it the verdict could not be justified.

Judgment affirmed.

J. D. Templin, for appellant.

Wm. Penn Clarke, for appellee.

Sullivan v. Finn.

SULLIVAN *et al.* v. FINN.

Where part of a debt was paid under the announcement that it should be received in full satisfaction, and where the creditor silently acquiesced in the proposition, by taking the money; held, that in the absence of consideration, such implied promise to take part in payment of the whole debt, was not a legal satisfaction.

In an action by a landlord to recover a balance on rents, the tenant cannot object to instructions given by the court in support of the landlord's right to the premises.

Where an irrelevant instruction was given, which could not prejudice appellant, the judgment will not be reversed.

After a trial upon the merits, without objection to the pleadings, the judgment will not be reversed, because a replication was not filed. It will be presumed that the replication was waived.

Appeal from Dubuque District Court.

Opinion by GREENE, J. This suit was commenced by Margaret Finn, administratrix of the estate of Patrick Finn, before a justice of the peace, to recover an amount of mineral rent from Dennis Sullivan and Daniel Crowley. Plaintiff recovered a judgment for the amount claimed, and defendants appealed to the district court. The cause was again tried by a jury. Verdict and judgment for plaintiff. A motion was made for a new trial and overruled.

To the proceedings below, we find a long list of errors assigned. The most material of them may be included under three propositions.

1. If a debtor pays to a creditor a less amount than is due under an averment, that it must be in full satisfaction, does it amount to such satisfaction where the creditor remained silent or acquiesced, and subsequently refused to acknowledge it as such? The court refused to instruct the jury in the affirmative, but did instruct them, that, "If from the evidence, the jury believe that there has been a satisfaction made by the defendants in this case, they must find for the defendants."

The instructions asked by defendants below, and which were refused, assume that the announcement of a debtor, that he was paying a less amount in full payment of the whole, would amount to a legal satisfaction, when the creditor at the time silently acquiesced. These instructions were correctly refused, for such is not the law. The payment of a part, is not a full payment, even if the creditor, without consideration, verbally agreed to receive such part payment in satisfaction of the whole amount. There must be some consideration for the promise to receive a less sum in satisfaction of a greater, in order to make such promise binding.

It was held in *White v. Jordan*, 27 Maine, 370, that a payment made in money of a part of a debt, does not operate to extinguish the whole debt, although it be received as a payment in full, unless there is some consideration for the relinquishment of the portion not due. So in *Eve v. Mosely*, 2 Strobb., 203, a partial payment of a debt, liquidated and payable, which is acknowledged to be in payment of the whole amount, is not a legal satisfaction of the whole amount; see also *Brook v. White*, 2 Mat., 283; *Fellows v. Hill*, 24 Wend., 294; *Bailey v. Day*, 26 Maine, 88.

In this case, the instructions asked by the defendants below, do not assume that the plaintiff even promised to receive the partial payment in full satisfaction. The first merely claims that if she left "the impression on him—the agent of the defendant's—that she took it in satisfaction of her demand to that date, she cannot revoke what she has done and defeat the satisfaction without returning the money thus received." The second proposes, "that if she received the money having been first told that she received it in full satisfaction to date; then it is a satisfaction and a refusal to acknowledge it, afterwards cannot defeat it." It is not pretended that there was anything more than an implied promise to recover a portion in satisfaction of the whole demand; nor is it pretended that the demand was not due, or that it was not liquidated, or that

it was of a doubtful character, or that there was any other consideration for her to take the less in satisfaction of the greater sum.

We conclude then, that the court was not only justified in refusing these instructions, but that it would have been gross error if they had been given. The substitute given by the court, was quite as favorable for the defendants, as the doctrine of satisfaction would justify.

2. It is objected that the court erred in giving the following instruction : " That if an administratrix expends money in good faith to improve property belonging to the estate of the deceased, that her acts will be protected by the court, and the benefit will pass to the estate even though the expenditure was not strictly proper for an administratrix to enter into."

We cannot understand how this instruction could in any way effect the rights of the defendants ; nor can we see that it was in any way applicable to the issue submitted to the jury. The defendants were lessees of the plaintiff, and held under her as tenants. She sued them for the rent mineral, which they had sold and converted into money. There is no question raised by the pleadings, or evidence in the case, that could render such an instruction necessary or appropriate. Whether the administratrix expended the money of the estate properly or improperly, could not in any way affect the liability of tenants to pay their rents. That question might be material to the heirs or creditors, but it could not affect or impair the liability of the tenants or debtors of the estate. These defendants held under the plaintiff, and had paid rent as her tenants, and were therefore estopped from denying her rights, and cannot object to any instruction given in support of those rights.

So far as the defendants were concerned, it matters not whether the instruction was given or refused. It could not have any influence with the jury upon the questions submitted to them. As they could not be prejudiced by this

irrelevant instruction, the judgment will not be reversed because it was given.

3. It is claimed that the defendants were entitled to a judgment under the pleadings. This objection was not raised in the court below, and consequently should not be entertained here. As the defendants referred the entire issue to the jury, and as the merits of the case have been determined without objection to the pleadings, it is too late now to raise that objection. The only ground for this objection is that plaintiff did not file a replication to defendant's answer, in which he averred payment. If the answer was such as called for a replication to deny new matter, averred by way of avoidance, after a trial upon the merits, without objection to the state of the pleadings, it will be presumed that defendant waived the replication. It has often been decided by courts, that after a trial upon the merits, a judgment will not be reversed because there was no replication to defendant's plea; *Glen v. Copeland*, 2 Watts and Serg., 261.; *Bond v. Hills*, 3 Stewart, 283.

The other objections urged to the instructions and proceedings below, are so obviously without foundation, that we do not consider them worthy of notice.

Judgment affirmed.

Samuels and *Vandever*, for appellants.

L. Clark and *Smith*, *McKinlay* and *Poor*, for appellee.

Ogilvie et al. v. Washburn et al.

An action was commenced against three joint and several makers of a promissory note. An attachment was sued out against one of them, on the alleged ground that he had disposed of his property with intent to defraud his creditors; held, that the court was justified in setting aside the attachment against one of the defendant's only, where there was no averment that the other defendants were insolvent, or in failing circumstances.

An attachment may be justified against one of the makers of a joint and several promissory note, if the petition for the attachment shows that the other debtors were insolvent, or non-residents of the state, or that they had absconded, so that the ordinary process could not be served upon them.

The object of the attachment law is to secure creditors against the efforts of debtors to defraud them, hence an attachment should be granted only where that object is to be attained.

The facts necessary to justify an attachment, should exist as to all the debtors of a joint and several obligation; or if the facts do not apply to all, it should appear that the remaining debtors are insolvent, before there can be occasion for the process.

An amendment to pleadings may be refused, if the proposed amendment cannot accomplish the object intended.

Appeal from Muscatine District Court.

Opinion by GREENE, J. This suit was founded on a promissory note, in which Z. Washburn & Son, J. W. Cohick and W. D. Ament, jointly and severally promised to pay five hundred and eighty-seven dollars and fifty cents to C. L. Phelps or order. The note was indorsed in blank by C. L. Phelps, and this suit was instituted by Adam Ogilvie and William St. John, as holders of the note. The petition was filed in the usual form, and at the appearance term of the court an amendment was filed to the petition, by which one of the plaintiffs swore that the matters set forth in the petition were true, and that as deponent verily believed, one of the defendants, Cohick, had disposed of his

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property with intent to defraud his creditors, and therefore prayed that a writ of attachment might be issued against the said Cohick. The attachment was issued accordingly. Cohick appeared and moved to quash the writ. The fourth reason assigned for this motion is, that "the petition and notice are against Z. Washburn & Son, J. W. Cohick and W. D. Ament, jointly, for a debt due by them jointly, and the attachment is against J. W. Cohick alone; and it is not stated that the said Washburn & Son and the said W. D. Ament are insolvent, nor non-residents of the State, nor about to dispose of their property, or that the plaintiffs were in danger of losing their demand unless attachment was issued against Cohick." On this reason the court granted the motion, and decided, that "the plaintiff could not sue his writ of attachment against only one of the defendants."

We think the attachment proceeding was very properly set aside, but we think the plaintiffs might have made out a case which would have justified an attachment against only one of the defendants. If the petition had shown that the other defendants were insolvent, or non-residents of the State, or that they had absconded, so that the ordinary process could not be served upon them, the attachment against Cohick might have been justified. But as no such case is made out by the petition, as there is nothing to show that the other makers were not abundantly solvent and able to pay the note, it follows that a *prima facie* case was not made out for the attachment.

The auxiliary process of attachment was instituted to secure creditors against the efforts of debtors to defraud them, and it can only be justified where it is apparent that the creditor is likely to lose his debt, or be seriously delayed in its collection unless that process is awarded. When, as in this case, the liability is joint and several, and when there are three different parties responsible for the payment, one or even two of those parties may have placed himself in a position that would justify an attachment

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against him or them, on an indebtedness for which he or they were alone liable, and still if the remaining party is solvent and able to pay the debt, an attachment could not be justified. If the remaining solvent debtor had sufficient to pay the debt, and had done nothing to justify the belief that he was about to dispose of his property with intent to defraud his creditors, there could be no necessity for the attachment.

The facts necessary to justify an attachment should exist as to all the debtors to a joint and several obligation, or if the facts do not apply to all, it should appear that the remaining debtors are insolvent before there can be occasion for that process. It should appear, *prima facie*, that the creditor is in some danger of losing his demand, for some of the reasons set forth in the attachment law, before the spirit and object of that law can be made applicable to the case. It follows, then, that the court below ruled correctly, in reference to the attachment. After the court decided this motion, the plaintiffs moved to amend the original petition by striking out the names of all the defendants, with the exception of Cohick's name, but this was refused. If this motion was made with the view of having the attachment reinstated, it was very properly rejected. The petition with the note annexed would still show that the suit was commenced on a joint and several instrument, and the same reason would apply why an attachment should not be issued against one of the debtors alone, unless the others were shown to be insolvent, or subject to the attachment process. True, any one of them might have been sued under the Code, § § 1681 1682, but it does not follow that an attachment might be issued against him alone, unless apparent that the others were insolvent or in failing circumstances.

The bill of exceptions does not show expressly the object of the proposed amendment, but we must infer that it was for the purpose of having the attachment against Cohicks

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properly reinstated, and with that object we think the court did not exceed a sound discretion in overruling the motion to amend.

Judgment affirmed.

Henry O'Connor, for appellants.

J. Scott Richman and *S. Whicher* for appellee.

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WILSON v. STRIPE.

Where property exempt from execution is taken on attachment, the fact may be shown on motion to dissolve the attachment, or on motion to have the property released. But if the party fails to avail himself of such motion, it does not follow that his right to the property is forfeited, or that he may not recover in an action of replevin.

The action of replevin is authorized by the Code, to recover the possession of personal property taken on legal process, if it was exempt from seizure by such process.

▲ judgment, until reversed, is conclusive of every issue that was or should have been tried under the pleadings, but it is not conclusive of facts that were not in issue, nor admitted by the pleadings, and therefore, if connected with an order to sell property under attachment, it is not conclusive that the property was not exempt from execution. An order to sell property, made at the time and in connection with a judgment, is independent of the judgment, and may be revoked or defeated by a replevin of the property without impairing the judgment.

▲ judgment with an order to sell property under attachment, is not a bar to an action of replevin for the property, on the ground that it was exempt from execution.

Appeal from Lee District Court.

Opinion by GREENE, J. This was an action of replevin, commenced by William C. Stripe, against Geo. B. Wilson as constable, to recover the possession of a horse which

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Wilson had taken 'on attachment against Stripe. The petition claimed to recover on the ground that the horse was exempt from execution. The cause was submitted to the court without a jury. On the trial, it appeared that the plaintiff was the head of a family, and that he had no other horse than the one taken in replevin. The court rendered judgment in favor of plaintiff; and decided that the plaintiff in replevin might have joined issue on the trial before the justice of the peace, and might have claimed there that the horse was exempt from execution or attachment, but that he was not bound to do so under the Code; and by not doing so, he did not waive his right to claim the horse as exempt from attachment; that the judgment and proceeding in attachment, before the justice of the peace, is not a bar to this action of replevin.

From this decision, Wilson appealed, and contended that Stripe ought to have claimed the horse as exempt from execution, on the trial of the suit of *Tapping v. Stripe*, in which the horse was attached, and that as he failed to make the issue at that time, he was estopped from claiming him in any other way.

It appears that Tapping sued Stripe before a justice of the peace, on a promissory note; that the horse in question was delivered to the constable on garnishee process as the property of Stripe; that judgment was rendered against Stripe by default, and the horse was ordered to be sold.

Although the proceeding is not expressly authorized by the Code, still we agree with the court below, that the defendant might have appeared before the justice for the purpose of showing that the property was exempt from the attachment. Where all the property attached is exempt, the fact might be shown on motion to dissolve the attachment, or on motion to have the exempted property released. But if the party fails to avail himself of such motion, it does not follow that his right to the property under the law, is forfeited, or that he is estopped from recovering it in an action of replevin.

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The action of replevin is expressly authorized by the Code, where the object is to recover the possession of personal property taken from the owner by legal process, and which was exempt from seizure by such process ; § § 1994, 1995. The owner of such exempted property, may avail himself of this remedy at any time before the property is finally sold by virtue of such process, unless the same issue had been *res judicata* on motion, in reference to the attachment. No such motion was submitted and tried in the present case ; consequently, the proceeding by replevin was authorized.

But it is contended that the property attached was ordered to be sold to satisfy the judgment, and that such order and judgment are conclusive against Stripe. This proposition goes too far. Such a judgment, until reversed, is conclusive of every issue that was or should have been tried under the pleadings. It is conclusive of defendant's indebtedness to the plaintiff, but it is not conclusive of facts that were in no way in issue, nor admitted by the pleadings. It is conclusive that the horse was ordered to be sold to satisfy the judgment, but it is not conclusive that the horse was not exempt from such sale, for that question was in no way involved by any issue before the court. Had a motion been made and tried to vacate or dissolve the attachment levy, on the ground that the property was exempt, and if that issue had been decided, then the question might be regarded as *res judicata*, and might be pleaded in bar to this action.

The judgment in the district court in this action of replevin is claimed to be in conflict with the judgment in *Tapping v. Stripe*, before the justice of the peace. It is claimed that the one is collaterally impeached and set aside by the other, in direct opposition to the uniform rulings of this court, in reference to the conclusiveness of judgments when collaterally assailed. But we can see no such conflict between the two judgments. The judgment against

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Stripe before the justice of the peace is in no way impaired by the judgment in replevin. It possesses the same force, vitality and conclusiveness since the replevin, that it did before. True, the auxillary proceeding in *rem* is affected by it, but that is no part of the judgment upon the merits. That judgment is perfect either with or without the attachment proceeding. It is also independent of the order of sale, and as complete without, as it can be with that order. Consequently, as the replevin proceeding merely affected the order of sale, it did not impair the judgment. It merely prevented an illegal sale of property to satisfy the judgment, but left the judgment just as effectual against property subject to execution as it was before the replevin suit was commenced.

We therefore conclude that the judgment and order to sell the property was not a bar to the action of replevin, for the property which was exempt from seizure under the attachment.

Judgment affirmed.

Edwards and Turner, for appellant.

J. Matthews, for appellee.

FRINK & Co. v. COE.

In an action for injury, sustained by the overturning of a stage coach, the declaration of the plaintiff, made at the time of the injury, are admissible in evidence, as a part of the *res gestae*.

If a declaration, made at the time the act was done, is calculated to explain the character, nature or quality of the facts constituting the act and its effects, so far as to unfold and harmonise them as parts of the same transaction, then such declaration may be regarded as part of the *res gestae*, and should go to the jury with the principal facts in the case.

Stage coach proprietors, who carry passengers for compensation, are responsible for all accidents and injuries happening to passengers, which might have been prevented by human care and foresight; they are consequently bound to furnish good and strong coaches and harness, gentle and well broke horses, skillful and prudent drivers, and the smallest degree of negligence in these particulars will render such proprietors liable for any injury to passengers.

Where a passenger has been injured in consequence of the gross negligence of a stage proprietor, by the employment of a known drunken driver, the injured party may be entitled to exemplary damages.

If a stage proprietor or carrier is guilty of gross negligence, it amounts to that kind of gross misconduct which will justify a jury in giving exemplary damages, even where an intent or design to do the injury does not appear.

A tender admits the liability or indebtedness to the amount of the sum tendered.

Appeal from Scott District Court.

Opinion by GREENE, J. This action was commenced by John Coe against John Frink & Co., proprietors of stage coaches running between Rock Island and Chicago, to recover damages for injuries sustained by the negligent and careless upsetting of defendants' coach, in which he had taken passage. The cause was submitted to a jury. Verdict in favor of plaintiff for the sum of two hundred and seventy dollars. Judgment accordingly. A motion made by defendants below for a new trial, was overruled. Defendants appealed, and now urge reasons for reversing the judgment.

1. It is claimed that the court erred in permitting to be given in evidence the plaintiff's declaration, made at the time, in reference to the injuries he had received by the casualty. It appears that the court permitted the following question to be put and answered: "What did the plaintiff say at the time of the overturning of the coach as to the injury he received?" The answer to this question showed that the plaintiff said at the time of the injury that his hand was fast and mashed. To this interrogatory and answer we can see no objection. This declaration of the party was a part of the *res gestae*. It was contemporaneous with the injury, and illustrated its character. It expressed the bodily feelings of the party, the location and nature of his suffering. Whether that declaration was real or feigned the jury should determine from the other facts and circumstances of the case; 1 Greenl. Ev., §§ 102, 108.

In § 102, Professor Greenleaf, among other appropriate examples, speaks of the representation of a sick person as to the nature, symptoms and effects of the malady under which he was laboring at the time, which may be received as original evidence, as distinguished from hear say. Upon the same principle should the declarations of a wounded man be received, as to the nature and effects of the injury, especially where those declarations were made immediately after the calamity, and while his injured limb was fast under the coach. It would seem impossible to make declarations more strictly a part of the *res gestae* than the words of the plaintiff in this case, uttered while his hand was still fast under the upturned coach, which had produced the wound.

According to the authorities, if such a declaration was made at the time the act was done, and is calculated to explain the character, nature or quality of the facts constituting the act and its effects, so as to unfold and harmonize them as parts of the same transaction, then such a declaration must be regarded as a part of the *res gestae*.

and may always be shown to the jury along with the principal facts; *Enos v. Tuttle*, 3 Conn., 250; *Oerter v. Buchanmon*, 3 Kelley, 518; *Blood v. Rideout*, 13 Met., 237; *Boyd v. Burks*, 14 How., 575; *In re Taylor*, 9 Paige, 611; 1 Greenl. Ev., § 102.

In an action by a bailor against the bailee for loss by his negligence, the declarations of the bailee, contemporaneous with the loss, are admissible in his favor, to show the nature of the loss. Story on Bailm., § 329, cites *Tompkins v. Saltmarsh*, 14 Serg. and Rawl., 275; *Beardlee v. Richardson*, 11 Wend., 25; *Doorman v. Jenkins*, 2 Ad. and El., 80. So in a prosecution for a rape, where the party injured is a witness, it is material to show that she made complaint of the injury while it was yet recent; 1 Greenl., § 102.

Although we consider such a declaration admissible, as tending to prove the issue, still, it cannot of itself be regarded as sufficient proof without some other corroborative evidence.

2. It is objected that the court erred in giving the following instruction, as requested by the plaintiff below: "That the proprietors of stage coaches which ply between different places, and carry passengers for hire and compensation, are responsible for all accidents and injuries happening to the persons of the passengers, which could have been prevented by human care and foresight."

This instruction contemplates a great degree of diligence, care and foresight on the part of stage proprietors, but not more, we think, than sound public policy dictates, nor more than the authorities justify. It was held in *Maurv v. Tadmadge*, 2 McLean, 157, that stage proprietors are bound to use the greatest care for the safety of passengers; that the least negligence by the drivers, or the want of skill makes them liable. So in *McKinney v. Neil*, 1 McLean, 540, it is decided that a stage proprietor is bound to furnish good coaches, gentle and well broke horses, good harness, and a prudent, skillful driver, and is liable to any

passenger who may receive any injury from any defect in these particulars, and is also liable for the smallest degree of negligence, carelessness or want of skill in the driver. With horses gentle and well broke, with coaches and harness good and strong, with drivers sober, prudent and skillful, a stage coach line might be regarded as managed with human care and foresight. With such an outfit, stage proprietors, in a level prairie country like Illinois and Iowa, would rarely if ever be called upon to pay damages for personal injuries to passengers. In *McKinney v. Neil*, 1 McLean, 540, the upsetting of a stage coach was held to be *prima facie* evidence of negligence. That doctrine is especially appropriate to a level prairie country, where nearly every accident may be traced to drunken or grossly careless drivers.

The instruction under consideration is quite as moderate towards stage proprietors as the authorities would justify. It appears to have been extracted almost literally from elementary works, as the settled doctrine of modern decisions—Story on Bailm., § 601; 2 Greenl. Ev., § 221; Angell on Carriers, §§ 536, 568 and notes.

3. Several errors are assigned and urged in reference to the true measure of damage. These may all be sufficiently comprised under one proposition, which was submitted by defendants below. They requested the court to instruct the jury, that no matter whether they believed the driver to be drunk or sober, the plaintiff is only entitled to the actual damage proved; and that he cannot recover exemplary damages, unless he proves the acts of the defendants to have been intentional and designed. This doctrine the court refused to submit to the jury as law. Upon this point we have some difficulty in arriving at a conclusion. If Professor Greenleaf's definition of damages is to be taken as the uniform test, applicable to all cases, then we should say that defendants submitted a correct proposition, which should have been given to the jury. Greenleaf declares, that "Damages are given as compensation, recompense,

satisfaction to the plaintiff for the injury actually received by him from the defendant. They should be precisely commensurate with the injury; neither more nor less;" 2 Greenl. Ev., § 253. This doctrine in reference to damages cannot be universal in its application. It is not appropriate to all cases and to all kinds of damages. It is not applicable to exemplary damages, nor to all cases where damages cannot be ascertained by actual computation.

It would seem that Professor Greenleaf's extreme views as to damages are not justified by the authorities, and are well refuted by Sedgwick; see Law Reporter of June, 1847; Sedgwick on damages, pp. 453 to 472; 6 Peters, 262, 282; 3 ib., 69; 10 ib., 80, 95; 3 Mass, 546; 10 ib., 459, 470, 473; 13 Pick., 451; 15 ib., 297; 1 Washington, 152; 3 John., 56, 64; 2 Mason, 120; 15 Conn., 225, 267; 6 Watts and Serg., 150; 13 Alab., 490, 502; 2 Martin, 257; 3 Scam., 378; 4 ib., 495; 2 Gil., 432, 436.

In a case of gross negligence on the part of a stage proprietor, such as the employment of a known drunken driver, and where a passenger has been injured in consequence of such negligence, we think exemplary damages should be entertained.

The term, exemplary damages, as contra-distinguished from actual damages, does not appear to be an entire stranger to the law, as shown by the authorities already cited.

If a stage proprietor or carrier is guilty of gross negligence, it amounts to that kind of gross misconduct which will justify a jury in giving exemplary damages, even where an "*intent or design*" to do the injury does not appear. The reason and necessity for this rule is becoming yearly more apparent. The consequences of such negligence on the part of carriers, is becoming more and more appalling. The alarming increase of railroad, steamboat and stage disasters, the frightful destruction of life, and limbs, and property, call loudly for a strict enforcement of the most exemplary rules, in reference to common carriers. If a stage proprietor employs a driver known to be drunken

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and careless, a more severe measure of damage should be awarded to the injured party, than in a case where some degree of care and diligence had been exercised by the proprietor. This principle appears to be favored in *McKinney v. Neil*, 1 McLean, 540. It was held, that the passenger need show nothing more than that the injury was occasioned by the upsetting of the stage coach, in order to sustain his action. It will then be incumbent on the defendant to show *by way of reducing the damages*, or in bar of the action, the circumstances of the case.

We conclude, then, that in refusing the instructions referred to under this head, the court did not err.

4. Appellants complain that the court refused to instruct the jury, that the making of a tender is no confession or admission of any liability on their part. We think this objection is without any foundation in reason or authority. In 2 Greenl., § 600, it is declared, that the plea of tender admits the existence and validity of the debt or duty; 7 John., 315; 2 Archbold's Prac., 184; 13 East., 202; 1 Bos. and Pull., 333; 2 ib., 392.

The court could not do otherwise than refuse the instruction asked by defendant, for it is not law. The very reverse of the proposition is true. A tender admits the liability or indebtedness to the amount of the sum tendered. So this court decided in *Johnson v. Triggs*.^(a)

Judgment affirmed.

Smith, McKinlay and Poor, for appellants.

Cook and Dillon and Wm. G. Woodward, for appellee.

(a) Ante 97.

Zeigler v. Jennison.

ZEIGLER v. JENNISON.

Where notices for an appeal were withdrawn, after they were left with the clerk and the attorney of the adverse party, the case remains as if no such notices had been served.

Where the papers in a case show that the appeal was not taken within one year from the time judgment was rendered, this court will not set aside an order dismissing such appeal, unless the fact is clearly established that the notices were served, and an appeal perfected within the time limited by the Code.

Appeal from Muscatine District Court.

Opinion by GREENE, J. The appeal in this case was dismissed, on the ground that it was not taken within one year after the judgment was rendered. A petition is now filed to grant a rehearing of the motion on which the appeal was dismissed. By the petition and answer, it appears that notices of appeal were served upon the clerk and defendant's attorney, within a year after the judgment was rendered, but both of these notices were soon after withdrawn. About six months afterwards a new set of notices were left with the clerk and defendant's attorney. But these new notices were not served until several months after the time limited for the appeal had expired. The petition and affidavit of plaintiff's attorney show, that the appeal was not perfected at the time the first notices were served, and that those notices were withdrawn in consequence of the desire of one or both of the attorneys to be absent at the time the case would have come before this court if the appeal had then been perfected. The petition and answer show considerable disagreement, as to the facts and circumstances under which the first notices were withdrawn.

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But independent of this disagreement, the petition does not present a *prima facie* case for setting aside the order dismissing the appeal. As the first notices were voluntarily withdrawn, the case was left as if no such notices had been served.

Where the papers in a case show that the appeal was not taken within one year from the time judgment was rendered, this court will not set aside an order dismissing such appeal, unless the fact is clearly established that the notices were served and an appeal perfected within the time limited by the Code. That fact is not so established by the petition and affidavit in this case, consequently the application must be overruled.

Judgment affirmed.

Wm. G. Woodward, for appellant.

H. O'Connor, for appellee.

BRIDGMAN et al. v. WILCUT.

The district court possesses general original jurisdiction against which nothing will be presumed.

The district court is authorized to entertain a direct proceeding to set aside an unauthorized sale made by the sheriff.

Where an objection to jurisdiction was not raised in the court below, it will not be entertained in the supreme court.

By appearing and pleading, the defendant admits the jurisdiction of the court.

When a defendant abides by his demurrer to the petition, the court will be justified in rendering a judgment agreeable to the prayer of the petition, on overruling the demurrer.

The supreme court will not consider new causes of demurrer, which were not presented to the court below.

Under a contract made in January, 1851, the homestead of the debtor is exempt from execution, by virtue of the act of 1849, to exempt a homestead from forced sale.

The homestead law, in force at the date of a contract, enters into and becomes a part of the contract, and the right acquired to have the homestead exempt from forced sale, is not impaired by a repeal of the law.

Appeal from Marion District Court.

Opinion by GREENE, J. At the February term, A. D. 1852, of the Marion district court, Wilcut filed his petition, setting forth that Bridgman and Reed, at the September term, A. D. 1851, obtained a judgment against him for \$258.65, that the contract on which said judgment was rendered, was made about January 1, 1851; and after the passage of the act to exempt a homestead from a forced sale, approved January 15, 1849; that an execution issued on said judgment on the 2d of October, 1851, and was placed in the hands of the sheriff of said county; that about the 15th of said month, said sheriff levied said execution on lot one in block two, in the town of Knoxville; that on 15th of November, the said sheriff sold said lot to said Bridgman and Reed, for \$80; that at the time of making the contract on which said judgment was rendered, the petitioner was a man of family, and is so still, and at the time of

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rendering said judgment, and the levy and sale, he owned no other real property; that he was in possession of said town lot, and claimed the same as a homestead, and that he so informed the sheriff at the time of the levy. The petition then prays that the levy and sale may be set aside, and that his title may be quieted.

Bridgman and Reed were made defendants, served with notice, appeared, and demurred to the petition. The demurrer was overruled; the defendants stood upon their demurrer, and a decree was rendered in accordance with the prayer of the petition.

The defendants below, bring the case to this court.

1. It is contended that the court had no jurisdiction of the case. No good reason has been assigned for this objection. The district courts of this state possess general, original jurisdiction. No other judicial tribunal in the state possesses original powers to the same general extent, and hence nothing will be presumed against its jurisdiction; *Wright v. Marsh*, 2 G. Greene, 94. In the present case, that court appears to have exercised jurisdiction in a direct proceeding to set aside and correct an unauthorized sale, made by an executive officer of the court. That court, and that court only, was authorized to entertain the proceeding, and correct or set aside the acts of its own office; *Reynolds v. Stanbury*, 20 Ohio, 344; 2 Yeates, 516; 7 Cowen, 367; 1 Eng., 425; 6 Wend., 522; 1 Scam., 498; 1 Gil., 435.

Besides, as this objection to jurisdiction was not raised in the court below, it cannot be raised in this court, unless the record itself shows the proceeding to have been *coram non judice*. By appearing and pleading, the defendant admitted the jurisdiction of the court. *Caudill v. Thorp*, 1 G. Greene, 95; 1 Morris, 156, 438; 2 Scam., 264, 279, 544.

2. It is objected that the court erred in overruling defendants' demurrer, and in setting aside the sale. If the demurrer was correctly overruled, it necessarily follows

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that the sale was properly set aside. As defendants chose to abide by their demurrer, the court could not do otherwise than regard the petition as confessed, and render a decree accordingly on overruling the demurrer.

The important question in this case is, did the court err in overruling the demurrer? In deciding this question we cannot entertain the new causes of demurrer raised in this court. We can only consider and review those causes which were assigned in the demurrer as filed in the court below.

The demurrer specified four causes, all of which may be resolved under a single question. Is a homestead exempt from execution under a contract made before the Code took effect? The first clause of demurrer, in substance, claims that the petition does not aver that the contract was made after the Code took effect. The second, that it shows the contract to have been made before the Code. The third and fourth declare that a homestead is not exempt from sale on a contract made prior to the Code. Thus it will be observed that they raise but the single question as above stated, and that the causes alleged are not sufficiently broad to defeat the petition, for the very obvious reason that they do not aver that there was no such homestead law in force at the date of the contract, and for the still more conclusive reason that there was such a law in force at the date of the contract, which entered into and became a part of the contract.

The petition shows that the contract on which the judgment was rendered, and under which the homestead was sold, was made about the first of January, 1851. At that time the act of January 15, 1849, "to exempt a homestead from forced sale," was in force. That act provided, that a homestead as therein designated should "not be subject to forced sale on execution or any other final process, from any court for any debt or liability, contracted after the fourth day of July, 1849." This law remained in force till July 1st, 1851, when it was superseded by the Homestead Law of the Code.

This law of the Code in no way impaired the obligation of contracts made under the antecedent law on the same subject. The old law was merged into the new, and contained the same conditions, stipulations and restrictions in all contracts made under it, so that the change in the law contemplated no change in contracts, and amounted to nothing more than a continuation of the substance of the old law, under a new style and in a new book.

The homestead law in force at the date of the contract having become a part of it, the superseding of that law by the substitution of the new law in the Code, cannot deprive the debtor and his family of their homestead rights, nor could the repeal of the homestead law weaken or impair the contracts made, or divest rights acquired while the law was in force. The debtor's right to the homestead was acquired under the law of 1849, and his homestead established while that law was in force, and his petition presents a *prima facie* case, showing his right to the premises as exempt from forced sale under that law. This right was not acquired under the Code, nor was it divested or impaired by it, and still the same homestead policy is continued and protected, and the law of 1849 is recognized by the Code.

As the petition contained every necessary averment to establish plaintiff's right to the homestead, it follows that the demurrer to the petition was correctly overruled.

Judgment affirmed.

J. C. Knapp, for appellants.

W. Penn Clarke, for appellee.

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MYERS v. SUNDERLAND.

One of two makers of a several or joint and several note, cannot avoid payment for a want of consideration, by showing that the other maker of the note received the entire consideration from the payee.

Parole contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. This rule is especially directed against the admission of any other evidence than that furnished by the writing itself, to explain away the language employed by the parties in making their contract.

Evidence *aliunde* not admissible, to show that one of the makers of a note signed the same with the understanding that his liability to pay was to be contingent.

Appeal from Wapello District Court.

Opinion by GREENE, J. This suit was commenced on a due bill worded as follows: "\$42 97. Due Benjamin Sunderland, administrator of the estate of John Davis, deceased, forty two dollars and ninety-seven cents, for value received. July 1st, 1850. James Weir, Joseph Myers." Joseph Myers appeared before the justice and filed an answer under oath, averring in substance that the due bill was signed by him as surety for James Weir, who, as principal, received the entire consideration for which the note was given; that he, Myers, as surety was not to pay the due bill only in case of the insolvency of Weir; that plaintiff knew and understood that his liability was thus limited and contingent; that the plaintiff should be required to prosecute the estate of Weir to insolvency. The answer called upon plaintiff to reply under oath. Plaintiff demurred verbally to the answer. The justice overruled the demurrer, and rendered judgment against the plaintiff, who appealed.

In the district court the same question was presented on the verbal demurrer, and was determined in favor of plaintiff, and judgment was rendered against Myers on the due bill.

The only question to be decided is, do the averments in the answer constitute a bar to the action? The answer admits that the payee gave a full consideration for the note, but claims that the consideration was received by Weir, one of the makers. It matters not which of the makers of a note received the consideration. It must be presumed that the payee was induced to give the consideration on the credit of the names attached to the note. The makers of such a note are severally and equally responsible, without regard to the party who received the consideration. The answer, then, is not good, on the ground that there was a want or failure of consideration, for the very obvious reason that it shows upon its face that there was good consideration paid for the note.

The answer claims that defendant signed the note as a conditional surety, and thus seeks to vary and contradict the note. The note of itself appears to be free from ambiguity or doubt. It is explicit and positive in its terms and free from conditions or contingencies. There is nothing about it that requires extrinsic proof or explanation. It is then of itself paramount evidence of the engagement or undertaking of the makers. The principle is well settled, that when parties have reduced their engagement to writing in such terms as import a legal obligation, expressed with clearness and certainty, it is conclusively presumed that the full extent and manner of the undertaking are expressed in the instrument and oral testimony offered to change, contradict, or alter the engagement, will be rejected; 2 Stark., Ev., 753; 1 Greenl., Ev., § 275. In the concluding words of this section the rule is concisely expressed. "Parole contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

This rule is uniformly and with especial force, directed against the admission of any other evidence than that furnished by the writing itself, to explain away the language employed by the parties in making their contract. The

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language of the present note clearly expresses the terms of the undertaking entered into by the makers. They unconditionally and severally acknowledge the indebtedness of the stated amount to be due to the payee. Now, one of the parties seeks to contradict and vary the terms of the valid instrument by parole contemporaneous evidence. He seeks to change his absolute promise to pay, to a mere conditional contingent undertaking. In Philip, Ev., 555, it is declared that parole evidence is not admissible, to show that a note purporting to be payable on demand, was intended by the parties to be payable on a contingency. Nor can parole evidence be received inconsistent with the terms of the note; Story on Promissory Notes, §§ 57, 58, 59, and note 2. A long list of authorities might be cited in support of this well established doctrine, all conclusively showing that evidence *aliunde* is not admissible, even to show that one of the makers of an absolute note signed the same, with the understanding that his liability to pay was to be contingent. It follows, then, that defendant's answer did not set up a bar to plaintiff's action, and that the district court did not err in sustaining the demurrer.

Judgment affirmed.

M. R. Lewis, for appellant.

H. B. Hendershott, for appellee.

RULES OF THE SUPREME COURT OF IOWA.

I.

At the commencement of each term, the causes will be called in order, but no case will be tried on the first calling, nor shall any but a continued case be tried on the first day of the term, unless by consent of parties. The same rule will be observed at any adjourned term, when the adjournment has been more than thirty days, unless specially ordered otherwise, at the time of the adjournment.

II.

Upon the second calling, either party has a right to a trial, unless for good cause shown. If passed by the consent of both parties, the cause will go to the foot of the docket, unless, for cause, the court shall otherwise direct.

III.

Causes submitted on written arguments will be disposed of without regard to their places on the docket.

IV.

Proof of the notice of appeal being served on the adverse party, must be made by copy of the notice, with the acknowledgment of service annexed, or by a return of the sheriff, or by affidavit of such service.

V.

If an appeal is taken, fifteen days prior to a regular term of this court, and the appellant fails to have the record filed with the clerk on the first day of the term, or if when taken within fifteen days of the term, he fails to have the case so docketed at the next succeeding term, the appellee, by producing a certificate of the clerk of the district

court from which the appeal was taken, stating that notice of the appeal had been duly served on him, and that the record had been prepared, may have the record filed and the case docketed, and the appeal dismissed, or the judgment affirmed, as the court shall determine from the circumstances of the case.

VI.

If an appeal is taken at any time before a term of this court, the appellee may waive the notice of fifteen days and have the record filed and cause tried in the first term after the appeal, unless the appellant show good cause for a continuance.

VII.

Errors must be assigned by the morning of the first day of the term, unless good cause be shown for the failure to do so, or unless the court, by a special order, extend the time.

VIII.

Assignments of error must not be vague and general, where the nature of the case will permit them to be otherwise, but must be explicit, and must point out with reasonable clearness, the objection to the judgment appealed from, or they will be treated as no assignment.

IX.

The court will regard those errors only which are assigned.

X.

If no joinder in errors be filed before the cause is regularly reached for trial, a general joinder will be regarded as having been put in.

XI.

All objections to form must be made before the cause is called for trial, otherwise they will be deemed waived.

XII.

Only two counsel will be heard on either side, except by

special leave of the court, and the appellant will in all cases have the opening and concluding arguments.

XIII.

In case of the death of a party, the same rules shall apply as are provided by law for cases in the district court, as far as those rules are applicable.

XIV.

Motions for *certiorari*, or for diminution of record, must be in writing, founded on affidavit, unless the record makes the fact apparent, or unless it is admitted by the adverse party. The application must be made at the first term after the appeal, unless sufficient cause be shown for the delay.

XV.

The opinions of the court must be immediately recorded by the clerk, the originals must then be placed in the hands of the reporter. As soon as they can be spared by him, they must be filed in the office of the clerk.

XVI.

All motions must be entered in the motion book, and shall stand over till next morning, after having been publicly called by the court, unless the parties otherwise agree.

XVII.

The party having the affirmative in any case arising in chancery, shall have the right to open and conclude the argument, unless for cause, the court shall otherwise direct.

XVIII.

No appeal in chancery will be heard, until the party having the affirmative in this court, shall prepare for use in the argument and decision, a concise statement of the points in issue, and of the testimony. This rule will apply to cases at law where the record is voluminous, and it becomes necessary to examine the facts, to determine the legal questions involved; and in all such cases, where an appearance is had for the defense, such concise statement

will be taken by the court as true, unless the defendant shall concisely and definitely point out, in writing, wherein the same is intended to be controverted.

XIX.

When the original papers in a case in which final judgment is not rendered in this court, are brought upon appeal or writ of error, either party desiring to withdraw the same can have leave so to do, on filing a receipt for them with the clerk, and causing a copy to be made of those papers which constitute the record under § 1977 of the Code, and paying the clerk's fee therefor, which costs shall be taxed to the party failing in this court; and such copy shall be filed by the clerk, and kept as record in the cause. In cases where the costs of such withdrawal have not been charged in the first bill of costs, the clerk is authorized to charge them as costs of increase, and to issue execution therefor.

XX.

Copies of record and arguments shall be paged at the bottom of the page, and copies of record of more than five pages shall contain an index referring to the different pleadings and papers. Briefs and arguments are required to be signed by the counsel, stating whether for the plaintiff or defendant.

XXI.

In criminal causes the plaintiff in error shall cause the transcript to be filed with the clerk of the supreme court, at least five days before the day set for the district, from which the cause may be brought.

XXII.

In criminal causes, the recognizance of the defendant, and in civil causes the supercedas bond,—if one is filed—or a certified copy thereof in either case, shall be sent up, although the party do not order it.

XXIII.

Transcript of record, [prepared for the supreme court,

shall be made substantially in the manner following; that is to say:

STATE OF IOWA, }
JOHNSON COUNTY. }

Pleas before the district court of Iowa, at a term begun and holden in the county of Johnson, on the first Monday of May, A. D. 1857, before the Hon. E. F., judge of the fourth judicial district, of the the state of Iowa.

A. B. }
v. } At law, or in chancery, as the case may be.
C. D. }

Be it remembered that heretofore, to-wit: on the first day of April, A. D. 1857, petition was filed in the office of the clerk of the district court, in and for the county of Johnson, in the words and figures following, to wit:

[Here copy the petition in full.]

Proceed in the same manner in relation to whatever paper is filed—such as the original notice, or a petition for attachment, &c.

If the cause has come from another county by the change of venue, begin as above, "Be it remembered," and state in like manner all that was done in the county *from* which the venue was changed.

And afterward there was filed in the office of the said clerk a notice in the words and figures following, to-wit:

[Here copy the notice *in full*.]

Upon which—or attached to which—was a return as follows:

Copy the officer's return, with all indorsements in full; if the suit be by attachment, copy the petition or affidavit, writ of attachment, bond, notice, return, &c.

Copy all indorsements on the *face* of the transcript, or copy of record, and not upon the back of the leaf.

And afterward, to wit: on the 27th day of April, A. D. 1857, there was filed in the office of the said clerk an answer in the words and figures following, to wit:

[Copy in full]

Should the clerk doubt what the paper properly is, let

him call it a "*paper* in the words and figures following," &c.

Where a paper is filed in term-time, add the day of the term to the day of the month—as in the next form.

A. B. }
v. }
C. D. }

And afterward, to wit: on the 4th day of May, A. D. 1858, it being the 4th day of the May term of the said court, the said A. B.—or plaintiff—filed the following demurrer to the answer of the said C. D.—or the said defendant—to wit:

[Copy the demurrer.]

If a party files more than one pleading at the same time, they should be numbered in their legal order, as for instance a demurrer, plea and answer, and the transcript may say,

—(stating date)—the said C. D.—or defendant—filed his demurrer, plea and answer, which are filed *de bene esse*—or, subject to the rule.

A. B. }
vs. }
C. D. }

And now on this 5th day of May, A. D. 1857, it being the fifth day of the said May term thereof, this cause coming on for hearing on the plaintiff's demurrer to the defendant's answer,—copy the entry of the proceedings of the court, sustaining or overruling the demurrer.

And afterward on the 6th day of the said May, it being the sixth day of the said term, the said plaintiff filed his replication in the words and figures following, to-wit:

[Copy the replication.]

And afterward on the same day the said defendant filed motion and affidavit for a continuance, as follows, to-wit:

[Copy it.]

And the same being now heard and considered by the court, the said motion is sustained, and it is ordered that

this cause be continued until the next term of the court—
at the cost of the defendant.

District Court, } September term, A. D. 1851.
JOHNSON COUNTY.

A. B. }
vs. }
C. D. }

And now on this 12th day of September, it being the
second day of said term, this cause coming on for trial,
came a jury, to-wit :

.....
twelve good and lawful men, who were sworn well and
truly to try the issue between the said parties, and a true
verdict to render according to the law and evidence given
them in court, the jury retired to consider on their verdict.
And afterward on the same day the jury returned into court
and rendered their verdict as follows :

[Copy it as entered of record.]

Or if the jury does not return until the next day.

A. B. }
vs. }
C. D. }

And now on this 13th day of September, the jury in the
foregoing cause returned into court and rendered their ver-
dict as follows :

[Copy as put in form by the court.]

A. B. }
vs. }
C. D. }

And afterward on the 14th day of September, A. D.
1857, being the fourth day of said term, the plaintiff—or
defendant—filed his bill of exceptions, in the words and
figures following, to-wit :

[Copy at large.]

A. B. }
vs. }
C. D. }

Now on this 15th day of September, A. D. 1857, the

plaintiff filed his motion for a new trial, as follows, to-wit:

[Copy in full.]

A. B. }
vs. }
C. D. }

And now on the 16th day of September, A. D. 1857, this cause coming up for a hearing on the motion of the plaintiff for a new trial, it is considered by the court that the same be overruled, or as the record entry may be.

Then add final entries of record, comprising final judgment, &c., and certificate of clerk.

NOTE.—The foregoing is but an *example*, and is to be varied according to the circumstances. The actual facts of the case will dictate *what* is to be done, but in all cases it is to be done substantially in *like manner* with the above, giving the proper order and date of the filing of papers and incorporating them at the proper dates into the proceedings of this court.

It will be understood that it is not necessary in all instances to send up the *whole* of the record, but the clerk may be guided by the directions of the appellant, under section 1976 of the Code. And he will observe section 1977 as to immaterial papers. Some qualifications are added in the prior rules.

XXIV.

After December term, 1857, all causes in this court will be heard on written or printed brief only, unless for sufficient cause the court shall otherwise direct. If a party desires to be heard orally, he shall serve on the opposite party, and file with the papers in the cause, a notice of his intention to apply to the court for permission to have the cause argued orally. The court will grant or deny the application in its discretion. In no other case will an argument at bar be heard.

XXV.

Attorneys of the district court, of any county of the State, admitted to practice in this court, may submit their

causes on written or printed brief, filed with the clerk of this court, by complying with rule No. 26.

XXVI.

The party holding the affirmative in this court shall furnish to the opposite party, ten days before the sitting of the court, or before the cause is set for trial, a memorandum of the points made and authorities cited, with an abstract of the argument. After receiving which a like memorandum of points and authorities, with an abstract of the argument in reply, shall be furnished to the party holding the affirmative.

XXVII.

In case the appellant, or party holding the affirmative, fail to prepare and file for the use of the court in the argument and decision, a concise statement of the points in issue, and of the testimony—as required by rule 18—or in case of failure to furnish the opposite party a note of the points and authorities, and of the argument, as required by rule 26, such opposite party may at the term at which the cause is entitled to be heard, file his statement and brief, and have the cause heard *ex parte*.

XXVIII.

In publishing the opinions of the court, it is enjoined on the reporter to print them in the order in which the causes are decided. A memorandum of the date of the decision of each cause should be appended in the margin. No opinion in any case in which a petition for re-hearing is filed, will be published until the question of re-hearing is finally determined.

XXIX.

Appeals to this court are only perfected, as required by the Code, § 1974, by notice to the clerk of the district court, and to the opposite party. Where a bond, however, to stay execution has been filed, and a notice of appeal served upon either the clerk or the adverse party, the appellee may file the transcript of the record in this court, and have the

judgment affirmed for want of prosecution, as under rule 5.

xxx.

No person shall remove from the court room, or the office of the clerk, any record of this court, except upon special leave granted for that purpose. No record shall be taken from the files of the court, except on application to the court or clerk, and a receipt executed therefor. All records removed or taken from the files, shall be returned in such reasonable time as the court or clerk may direct, not exceeding five days. The clerk will report promptly to the court every violation of this rule. In no case will it be permitted to any person to remove any papers or records from the place in which the court holds its sessions.

xxxi.

Where appeals are taken less than fifteen days before the term, if the appellee designs insisting upon a hearing, or moving an affirmance of the judgment, at such term, he must give to the appellant notice in writing of such intention; and when the case is called it will be heard or continued as the circumstances of each case may seem to render proper and necessary.

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7. When the answer distinctly traverses the material averments in a petition, so far as they relate to the attachment, that issue of fact, if desired by defendant, should be regularly tried and determined. *ib.*
8. An attachment should not be granted, unless asked for in plaintiff's petition. *Dawson v. Jewett*, 157

9. Where the petition commencing the action was filed, and a writ of attachment issued on the same day, it will not be presumed that the attachment was issued before the action was commenced. *Pitkins v. Boyd*, 255

10. The petition for an attachment may be sworn to by any person qualified to be put under oath. *ib.*

11. Where the averments in a petition are positive and do not claim to be the result of information; and where the affiant swears "that the matters and things set forth in the foregoing petition are true, so far as the same are matters of personal knowledge; and so far as the same are matters of information he verily believes them to be true;" held, that the latter clause is surplusage and cannot invalidate the affidavit, *ib.*

12. The provision of the Code authorizing an attachment on a debt before due, does not apply to a non-resident, *ib.*

13. Where a party seeks to recover damages for the wrongful suing out of an attachment, his action should be founded on the attachment bond. *Abbott v. Whipple*, 330

14. Where it appears that the original notice and attachment were issued at the same time, it will be considered that the attachment was sued out at the commencement of the suit, and it is error to dismiss the attachment in such a case, on the assumed ground that it was sued out before suit was commenced. *Nuckolls v. Mitchell*, 432

15. An attachment is auxiliary and incident to the proceedings over which the district court is invested with general jurisdiction; hence, the attachment may be defective and the principal case not so. *Rowan v. Lamb*, 468

16. Where a writ of attachment commanded the sheriff to levy, "Upon the defendant's property in Lee County, Iowa," and returned on the back of the writ, "Served the within

- attachment by attaching," &c., certain property described in the return, it will be presumed that "The property attached was the property of the debtor." *ib.*
17. A court will not intend facts inconsistent with the returns of a writ in order to divest rights acquired under it; but will rather presume a levy to have been duly made, in order to support those rights. *ib.*
18. In an attachment, it is the levy that gives the court jurisdiction over the property, and not the return on the writ. *ib.*
19. *Tiffany v. Glover* 3. G. Greene 387, overruled. *ib.*
20. An action was commenced against three joint and several makers of a promissory note. An attachment was sued out against one of them, on the alleged ground that he had disposed of his property with intent to defraud his creditors; held, that the court was justified in setting aside the attachment against one of the defendant's only, where there was no averment that the other defendants were insolvent, or in failing circumstances. *Ogilvie v. Washburn*, 548
21. An attachment may be justified against one of the makers of a joint and several promissory note, if the petition for the attachment shows that the other debtors were insolvent, or non-residents of the state, or that they had absconded, so that the ordinary process could not be served upon them. *ib.*
22. The object of the attachment law is to secure creditors against the efforts of debtors to defraud them, hence an attachment should be granted only where that object is to be attained. *ib.*
23. The facts, necessary to justify an attachment, should exist as to all the debtors of a joint and several obligation; or if the facts do not
- apply to all, it should appear that the remaining debtors are insolvent, before there can be occasion for the process. *ib.*
- See ASSIGNMENT*, 3, 4, 5.
ERROR, 3.
JURISDICTION, 3, 4.
LEVY, 2
PLEADING, 8, 14.
REPLEVIN, 3.
STEAMBOAT, 2.
- ATTACHMENT BOND.
1. In a suit upon an attachment bond, the petition should aver that the attachment plaintiff had no sufficient cause for believing the facts sworn to in the affidavit. It is not sufficient to aver that the facts were not true. *KINNEY, J., contra. Winchester v. Cox*, 121
2. An attachment bond may be good, although not executed by the plaintiff in the action. *Pitkins v. Boyd*, 255
3. In an action on an attachment bond, the remarks of the defendant, at the time he procured the writ, not admissible, to show his motives. *Shuck v. Vanderveenter*, 264.
4. Where a petition, found upon an attachment bond, avers that "the attachment was wrongfully and willfully sued out by the defendant, when in truth and in fact, the plaintiff was not indebted to them in any amount whatever," it is sufficient without any averment as to belief. *Porter v. Wilson*, 314
5. In an action upon an attachment bond, where the plaintiff seeks to recover on the ground that he was not indebted to the attachment plaintiff, the petition need not give the substance of the affidavit. *ib.*
- See ATTACHMENT*, 13.
PLEADING, 8.

ATTESTATION.

See PROCESS, 1.

RECORDS, 3.

AWARD.

1. An award is valid under an agreement to have it returned to a justice of the peace for judgment upon the award; although the district court is the more appropriate tribunal. Such an award may be pleaded in bar to an action upon the same subject matter. *King v. Hampton*, 401

B.

BAIL BOND.

1. In an action upon a bail bond, when a copy of the bond is annexed to, and thus becomes a part of the petition, such facts as are established by the bond, need not be averred in the petition. *Ferguson v. The State*, 302
2. By making a bail bond, the obligors admit the facts and circumstances which rendered the bond necessary, and it will be presumed that these facts gave the officer jurisdiction to take the bond. *ib.*

See RECORD, 2.

BANKRUPTCY.

1. Where the record of a decree shows an absolute discharge in bankruptcy, and also shows that the bankrupt was authorized to receive a certificate, it is sufficient evidence of discharge in bankruptcy, without the certificate. *Viole v. Blanchard*, 299
2. Where the record shows jurisdiction in a proceeding of bankruptcy, the decree is conclusive evidence of the discharge, without pleading the certificate. *ib.*

See ASSIGNMENT.

BASTARDY.

1. In a case of bastardy under the Code, the county court is authorized to take from the father of the child, such security as may be directed by the court, to save the county and every other county in the state from all charges for the maintenance of the child; but in addition to this security, the county court has no authority to require a quarterly payment to the county treasurer; and to correct such unauthorized requirement a writ of *certiorari* may be issued from the district court. *Caburn v. Mahaska County*, 242

BILL OF EXCEPTIONS.

1. Where the bill of exceptions does not purport to give all the evidence, it will be presumed that the facts as found were sufficiently established by other proof. *Stockton v. City of Burlington*, 84
2. Where the bill of exceptions does not purport to give all the evidence in the case, it will be presumed that the evidence adduced on the trial was sufficient to justify the decision. *Rowan v. Lamb*, 468
3. Where a bill of exceptions describes in detail the exhibits and title papers introduced, and states "Being all the evidence offered by the plaintiff to sustain the issue on his part," it must be concluded that no other evidence was offered in behalf of the plaintiff. *ib.*

See EVIDENCE, 19.

BILL OF EXCHANGE.

See ORDER.

BOUNDARY.

1. In the act of 1847, the northern boundary line of Dubuque is designated as starting from a given "stake and stone," "thence on the north boundary north sixty seven degrees thirty minutes, east to the middle of the main channel of the Mississippi river;" held that the general and unidentified words "on the north boundary," would not justify a deflection from the given course, and that the locative termini of the line, and the given course, must govern. *Morrison v. Langworthy*, 177
2. It is error to overrule an application for a change of venue, merely on the ground that it was not sworn to by the party himself. Such application may be sworn to by the attorney of the party applying, or by any other person. *Ellsworth v. Henshall*, 417

CHALLENGE.

See GRAND JURORS, 5.
JURORS, 2.

C

CANCELLATION.

See RESCISSION OF CONTRACTS.

CAVEAT EMPTOR.

See SHERIFF'S SALE, 6, 7.

CERTIORARI.

1. A writ of *certiorari* is authorized where the inferior tribunal has exercised judicial powers not authorized by law, and where there is no other plain, speedy and adequate remedy. *Coburn v. Mahaaska County*, 242

See APPEAL, 1, 2.

CHANGE OF VENUE.

1. Where proceedings come before the district court by change of venue, with no other record or papers than the petition and order for the change of venue, the suit may be dismissed. *Thompson v. Campbell*, 322
2. After granting a change of venue to another county, the district court has no longer jurisdiction over the case, and is not authorized to render judgment against the defendant. *Campbell v. Thompson*, 415

CITIES.

1. Where a city is authorized to grade and regulate streets, and in constructing gutters, culverts and drains, the work is left in such an unfinished, careless and negligent state as to cause water to flow upon and injure private property, the city is liable to the owner for the damages. *Wallace v. City of Muscatine*, 373

2. Where an incorporated company is authorized to do an act; and where it is so negligently done as to occasion loss and injury to others, the same liability should attach to the corporation, as would attach to an individual under like circumstances, *ib.*

See STREETS.

CLAIMS.

See TRUST, 1.

COMMON CARRIER.

1. A steamboat, as carrier, received boxes of goods in apparent good order at Galena, and delivered them to the consignee at Dubuque, on the same day in like apparent good order. On opening the boxes, it appeared that the goods had been wet a day or more before they were shipped on the boat; held, that the

consignee had no right to set off the damages against the bill of the carrier, for the charges advanced and the freight; that the external appearances of the boxes, at the time they were delivered to the carrier, was not a true test of the internal condition, nor was the bill of lading conclusive that the goods inside of the boxes were in good condition. *Carson v. Harris*, 516

2. Where one common carrier receives goods from a forwarding merchant, in apparent good order, and subsequent to the delivery to the consignee, it appeared that the goods had been previously wet and injured by some other carrier; held, that the carrier who last received the goods was not liable for the injury they received while they were in charge of a previous carrier, with whom he had no connection, *ib.*

3. A carrier, who receives goods to carry for hire, is bound to take due care of them in their passage, to deliver them safely and in the same condition as when they were received by him; or in default thereof, he is liable to the owner to make adequate compensation for any loss or damage which may happen to the goods while in his custody; but he is not liable for any loss the goods may have sustained before they came into his charge. *ib.*

4. The public good requires the courts to relax nothing from the common law responsibility of carriers. *ib.*

5. Stage coach proprietors, who carry passengers for compensation, are responsible for all accidents and injuries happening to passengers, which might have been prevented by human care and foresight; they are consequently bound to furnish good and strong coaches and harness, gentle and well broke horses, skillful and prudent drivers, and the smallest degree of negligence in these particulars will render such proprietors liable for any injury to passengers. *Frink v. Coe*, 555

6. Where a passenger has been injured in consequence of the gross negli-

gence of a stage proprietor, by the employment of a known drunken driver, the injured party may be entitled to exemplary damages. *ib.*

7. If a stage proprietor or carrier is guilty of gross negligence, it amounts to that kind of gross misconduct which will justify a jury in giving exemplary damages, even where an intent or design to do the injury does not appear. *ib.*

See FERRY.

CONSIDERATION.

1. A mere moral obligation is not a sufficient consideration to support a note between the parties to such obligation. *Nightingale v. Barney*, 106

CONTRACT,

1. Where a party subscribed to the stock of a plank road upon other conditions than those named in the articles of incorporation, and subsequently paid five per cent., which was accepted by the company; held, that the transaction shows concurrence in those new conditions and creates mutuality. *Nichols v. Burlington and Louisa County Plank Road Co.*, 42

2. Where R. sold to B. a quantity of wood delivered on a boat at a landing, at a stipulated price per cord; and where the boat containing the wood was taken from the landing by B., without ascertaining the exact quantity of wood, and while towing the boat from said landing it was sunk and the wood lost; held, that B. had possession of the wood, and was liable to R. *Bogy v. Rhodes*, 133

3. A written contract cannot be materially changed by parole agreement. *Jones v. Alley*, 181

4. The time stipulated for payment in a written contract may be extended by parole agreement, but it cannot by parole be made essential, when

it is not so stipulated in writing, *ib.*

5. The *lex loci contractus* not applicable to questions merely remedial. *Shaffer v. Bolander*, 201

6. In an action upon a contract, in which the defendant sold land, as a tavern stand, to the plaintiff, under the express stipulation, as an inducement to the purchaser, that the defendant should discontinue tavern keeping at his residence near the land sold; held, that such contract was violated by occasionally keeping travelers for pay; that the defendant could not be justified in entertaining any part of the traveling public for compensation, and that the plaintiff need not prove special damages. *Heichew v. Hamilton*, 317

7. Where four parties entered into a written agreement to go upon a joint adventure to California; and where about a month after, three of the same parties, with another, not a party to the original, make additional stipulations referring to and connected with the first agreement, and in reference to the same adventure, and on the same sheet of paper; held, that the two agreements should be regarded as one and the same contract. *Logan v. Tibbott*, 389

8. In an action upon an agreement where each party had sustained damages by a failure of the other to perform, the defendant's right to damages may be set off against the plaintiff's, and it is error in the court to exclude evidence tending to prove defendant's right to damages. *ib.*

9. A special contract to furnish an engine may be considered abandoned by defendant, where the plaintiffs proposed and were ready to set up the engine at the time stipulated, and again three months after, but both times defendant declined having it done; also where the plan of the engine subsequently ordered and set up, was materially changed, by direction of defendant; and also where defendant acknowledged the correctness of an account, subsequently presented, and which included the price of the engine. *Buford v. Funk*, 493

10. V. sold property to B. and took a deed of trust. B. gave a mortgage to R., and about a year after V. signed a contract to R., agreeing that R. might furnish certain mill improvements upon the property, and have a lien therefor, but the contract did not in any way refer to the mortgage; held, that such contract did not show actual notice, or a sanction of the mortgage. *Brewer v. Crow*, 530

See MECHANIC'S LIEN, 1, 2.
MORTGAGES, 1.
PLEADING.
PRACTICE, 10.
PROMISSORY NOTES, 1.
SALE, 2.
SHERIFF'S SALE, 12.
STATUTES, 2, 3.
STATUTE OF FRAUDS.

COSTS.

1. Costs accruing in the district court should be determined by that court, and should not be referred to the county court. *Ball v. Humphrey*, 204

COUNTY.

See RAILROADS.

COUNTY BONDS.

1. A proclamation directing a vote of the people for or against issuing bonds to a railroad company, under the stipulation that they should be issued "only in the event of said railroad being constructed and running centrally through the county;" held, that the vote being favorable to the railroad, the county judge had a right to issue the bonds on being made satisfied that said road will be built centrally through the county. *Greene, J., contra. The State v. Bissell*, 328

See RAILROADS, 4

COUNTY COURT.

1. Proceeding in reference to a county road were taken by appeal to the district court, where appellees moved to dismiss the appeal on the ground that application for damages were not made within the time required by law, and because the district court has no jurisdiction over the question of damages: held, that as the county judge had acted upon the question of damages without objection, the appeal should not be dismissed. *Ball v. Humphrey*, 204
2. The location of a road, where it does affect the rights and interests of individuals as distinguished from the public, is not the subject of appeal, and cannot be reviewed by a jury in the district court, but when it involves a question of damages to the land of an individual, that question may be taken to the district court, and all questions affecting the public only, should be referred back to the county court. *id*
3. All the powers and duties designated by the Code, as devolving upon the county judge, may be exercised by the county court; and all decisions made by the "county judge" are in legal effect the decisions of the "county court;" and from all such decisions an appeal is allowed, as provided by § § 131 to 135 inclusive. *Lee County v. Nelson*, 348
4. The county court is specially limited in jurisdiction, and has no authority to adjudicate titles to land. *Hall v. McMahan*, 376
5. Where land has been entered by a county judge for town purposes, under the act of 1852, he is a naked trustee, and cannot be sued alone for title to any of the lots in controversy. The city or school district, as *census que use*, should be joined with him. *Graves v. Steel*, 377

See BASTARDY.

COSTS.

COUNTY COLLECTOR AND TREASURER.

MINORS, 2.

PRACTICE, 7.

STATE REVENUE, 1.

COUNTY COLLECTOR AND TREASURER.

1. A county collector and treasurer is authorized by the Code, to employ a deputy, and it is the duty of the county court to make reasonable allowance for the services. If the salary is not stipulated before the service are performed, reasonable compensation to be determined by law and evidence, must be made after the services are rendered. *Bradley v. Jefferson County*, 300
2. Where F., acting as county treasurer for two years before the Code, obtained subsequently a receipt from B., as county judge, in full for state and other taxes, the county judge not being authorized to receive the state revenue, or settle for the same; and where judgment had been rendered against F. and his security for the amount of state tax which had been paid by him to the county judge; held, that F. could not recover from the county the amount of state revenue paid by him to B., as county judge; that B. became personally liable to F.; but as B. acted in reference to the state fund, without authority, such act could neither bind the state nor the county. *Jefferson County v. Ford*, 367

COUNTY SEAT.

1. A county seat may be changed by an authorized vote of the people, even from a location declared by law to be permanent, although land had been deeded to the county to secure such permanent location. *Twiford v. Alameda County*, 60
2. Where a party was induced to de c d

land to a county, in consideration of having the county seat permanently located on or near his land, and if the county seat is subsequently removed by vote of the people, the county should re-convey the land to the party. *Twiford v. Alamakee County*, *ib*

COURTS.

1. Where the record shows that any other person than the judge *de-jure* decided the cause in the district court, the judgment should be reversed. *Winchester v. Ayres*, 104
2. Where the February term of the court was commenced under an act in force at the time; and where a new act took effect on the third day of the term, changing the time of holding the court; held, that a decree rendered at the term of court, after the new act took effect, is valid. *Clare v. Clare*, 411

See DISTRICT COURT.
DISTRICT JUDGE.
COUNTY COURT.
JURISDICTION, 2.
SUPREME COURT.

CUSTODY.

See ARREST.

D

DAMAGES.

1. Section 1831 of the Code should be strictly construed. The constitutionality of this section questioned. *Hedeholm v. Sangster*, 340

See COMMON CARRIER, 6, 7.
CONTRACT, 8.
PLEADING, 1.
PRACTICE, 6.

DECREE.

See COURTS, 2.
PRACTICE, 9.

DEED.

1. A deed with a defective certificate of acknowledgment, is admissible in evidence, but is not exclusive without further proof. *Gould v. Woodward*, 82
2. A deed, defectively acknowledged, is good between the parties, but not sufficient to impart notice of the sale to others. *ib*

DEED OF TRUST.

4. Title *bona fide* derived under a deed of trust, where the trustees were vested with the power to sell, and also with the legal title, will not be disturbed by those irregularities, in reference to the powers of the trustees, which might affect the validity of the sale, where the power to sell is not coupled with the title. *Rowan v. Lamb*, 468

DEFAULT.

See JUDGMENT, 1.
NOTICE, 12.
PRACTICE, 3.
SERVICE BY PUBLICATION, 3

DELIVERY BOND.

See ATTACHMENT, 1.

DEMAND.

See ORDER 1.
PROMISSORY NOTES, 1, 2.
REPLEVIN, 1.

DEPOSITIONS.

1. Reading the notice to the adverse party, of the time and place of taking depositions, is sufficient service where no copy is demanded.

Brewington v. Endersby, 263

2. Where the defendant took exceptions to a deposition which had been taken by plaintiff, but before the question was decided, waived his exception and offered to read the deposition in his own behalf; held, that the court erred in rejecting the deposition. *Crick v. McClintic*, 290

3. A deposition, properly taken, may be used on a trial in the same manner as the testimony of a witness.

ib.

4. After a deposition is returned to court the objection cannot for the first time be raised, that the questions were leading. *Keeney v. Chilis*, 416

DES MOINES RIVER LANDS.

See EVIDENCE, 4.

DISTRICT COURT.

1. The district court has concurrent jurisdiction over all offenses cognizable before a justice of the peace. *Orton v. The State*, 140

2. The district court has jurisdiction in all cases of divorce and alimony, in the county wherein the plaintiff resides, even in cases where it appears that the cause of action arose outside of the county or state. *Smith v. Smith*, 266

3. The district court possesses general original jurisdiction, against which nothing will be presumed. *Bridgman v. Wilder*, 563

4. The district court is authorized to entertain a direct proceeding to set aside an unauthorized sale made by the sheriff. *ib.*

See APPEAL, 6.

COSTS, 1.

COUNTY COURT, 2.

DISTRICT JUDGE.

1. Section 1797 of the Code unconstitutional so far as it authorizes any person—not in reality a district judge—to act in that capacity with all the powers of the court. *Winchester v. Ayres*, 104

2. Consent of parties cannot authorize a person, not a judge of the district court, to act in that capacity. *Petty v. Durrall*, 190.

See COURTS, 1.

DIVORCE AND ALIMONY.

1. In order to give the court jurisdiction in a case of divorce, the plaintiff's residence in the county must be *bona fide*, and not merely for the purpose of obtaining a divorce under the laws of Iowa. *Smith v. Smith*, 266

2. The Code, in reference to divorce, should be strictly enforced, and the requirements fully observed, *ib.*

3. Where a petition, filed by the husband, alleges as cause for divorce, "that she has wilfully absented herself from her home with the petitioner for the space of three year," it is fatally defective, unless it also alleges that she absented herself "without sufficient cause." *Pinkney v. Pinkney*, 324

4. In a petition for divorce it is not sufficient to allege, "that he and his said wife cannot live in peace and happiness together, and that their welfare requires a separation." The petition should allege facts and circumstances that would render the above conclusion "fully apparent." Code, § 1482, *ib.*

5. A petition for divorce should distinctly state the facts constituting the cause, and should show *prima facie* that the complainant is the injured party before a divorce is decreed by default. *ib.*
6. A decree of divorce cannot be justified unless the evidence tends to show that the separation relied upon was willful, and that the complainant was not instrumental in procuring it; or unless the evidence will justify the conclusion that the peace, happiness and welfare of the parties require it, and that the complainant is the injured party. *ib.*
5. Where the husband died under the Rev. Stat., and the widow gave birth to a posthumous son after the Code took effect; held, that the widow is entitled to dower under the Rev. Stat., and also on the death of the son, may inherit one-third of his estate in fee. *Rowland v. Rowland*, 183
6. In an action for dower to lots in the city of Dubuque, on which plaintiff's husband had a pre-emption right, but conveyed his right, by deed, to B., who thereupon purchased the title from the United States, and subsequently conveyed the same to the defendant; held, that defendant was estopped from showing that plaintiff's husband was not seized of the lots, and that she was entitled to her dower therein. *GREENE, J., contra. Davis v. O'Ferrall*, 358

See ALIMONY.
DISTRICT COURT.

DRAM SHOP.

See INDICTMENT, 4.
INTOXICATING LIQUORS, 1.

DOWER.

1. Under the statute of 1839, as at common law, the widow is entitled, during her natural life, to one-third part of all the lands and tenements in which her husband was seized, at any time during coverture. *Davis v. O'Ferrall*, 168
2. The Code provides that the widow's dower shall be one-third of her husband's real estate in fee simple. *ib.*
3. Courts favor dower, but this rule should not be carried so far as to impair vested rights, by giving a statute a retrospective operation. *ib.*
4. The Code does not operate retrospectively in reference to dower, consequently when the husband conveyed his title to land, without the wife's relinquishment, before the Code took effect, and died subsequently, the widow is entitled to dower, for life only, according to the law in force at the time of sale. *ib.*
7. Where the husband conveyed his title to land, before the Code, and died after it took effect, his widow is entitled to dower for life only, according to the law in force at the date of the conveyance. *ib.*
8. The fact that the defendant was a *bona fide* innocent purchaser, without notice, is not allowable as a defense to an action of dower. *Gano v. Gilruth*, 453
9. A court of equity has jurisdiction in a proceeding for dower where an account is prayed. *ib.*
10. In Iowa, where dower attaches to legal and equitable interests in land, there would seem to be good reason why courts of law and equity should exercise concurrent jurisdiction in dower cases. *ib.*

See ACKNOWLEDGMENT, 2.

DUBUQUE CITY.

See BOUNDARY, 1.

E

EQUITY.

1. Where matters of account affecting heirs, relate to the rents, &c., of lands in controversy, and where such account can be adjusted in the action at law in relation to the land, it would furnish no reason for taking the case into equity. *Claussen v. Lafrenz*, 224
2. Where a party has an adequate remedy at law, he cannot resort to chancery. *ib.*
3. The distinction between law and equity jurisprudence is recognized by the constitution, and is not abolished by the Code. *ib.*
4. A court of equity having acquired jurisdiction over the subject matter for one purpose, may be invested with jurisdiction for other purposes, even when they pertain in part to courts of law, so as to secure complete equity and justice between the parties. *Franklin Insurance Co. v. McCrea*, 229
5. On the return of a precedendo from the supreme court, in which a petition in chancery was declared to be without equity; held, that the district court did not err in granting complainant's motion to dismiss his petition without prejudice. *Rynear v. Neelin*, 524
6. The separate answers of several defendants being under oath, and denying all the material allegations of the bill, are sufficient to defeat the bill in the absence of any reliable proof to the contrary. *Chauvete v. Mason*, 231
7. Although the defendant answered to the bill, still if a demurrer would hold against it, a court will not, in general, grant the relief sought. *ib.*
8. Where a petition prays for the rescission of a contract, but the *gravamen* of the petition is the failure of the defendant to pay for land as stipulated in the contract; and where the petition avers neither

fraud in the contract, nor the insolvency of the purchaser, so as to give the court jurisdiction in chancery, it should be dismissed for want of equity. *Brainard v. Holsapple*. 2485

9. Where a petition shows a case in which a perfect remedy would be afforded by a court of law, it cannot claim that relief which can only be awarded by a court of equity. *ib.*
10. The cases in which equity relieves by setting aside deeds, contracts, &c., are founded upon actual fraud in the defendant, or upon constructive fraud against public policy. *ib.*
11. A petition in equity must show a right to relief beyond the mere breach of a contract, which would confer a right of action at law. *ib.*

See DOWER AND ALIMONY, 9, 10
TRUST, 4.

ERROR.

1. This court will not reverse upon questions of fact, unless the testimony of record clearly shows error. *Davis v. Moffitt*, 92
2. All legal presumptions will favor the decision below. *ib.*
3. It is error to render judgment upon a debt not due, without the consent of the debtor, although property may be attached to secure such debt. *Crew v. McClung*, 153
4. Every fair presumption should be in favor of the decision below, and therefore facts should not be presumed that would indicate error. *Lawson v. Campbell & Brother*, 413

See INDIOTMENT, 8.

ESTATES.

1. An action should not, at first be instituted against the heirs of an estate

- for the collection of a debt. The estate should be administered agreeable to the Code, Chap. 83. *Roy-nolds v. May*, 283
2. Where a claim is filed against the estate of a decedent, under § 1539 of the Code, a copy of the written instrument or account, upon which the claim is founded, should be annexed to the claim. A claim clearly stated under that section of the Code amounts to the same thing as a petition. *Baker v. Chittuck*, 480
3. A copy of a claim filed under § 1399 of the Code, with the time of hearing indorsed thereon, constitutes the notice to be served upon the representatives of an estate. If such claim is materially deficient, the notice is equally so. *ib.*
- See HEIRS.
INHERITANCE.
- ESTOPPEL.
1. Where there has been a previous recovery on the same contract, the plaintiff may set up such previous recovery, by way of estoppel, to show that certain stipulations in the contract, as conditions precedent on his part, had been complied with, and the defendant was estopped from denying all but the subsequent breach and damage. *Hichew v. Hamilton*, 317
- See DOWER.
SHERIFF'S SALE, 10.
- EVIDENCE.
1. A book of accounts admissible as conducing to prove a payment for rails that were not furnished. *Johnson v. Patten*, 63
2. The testimony of one accomplice not sufficient to corroborate the testimony of another accomplice. *Johnson v. The State*, 65
3. A prisoner should not be found guilty on the testimony of two accomplices unless confirmed by some other testimony. *ib.*
4. The certificate of purchase or duplicate receipt of the treasurer of the Des Moines river board of public works, is made *prima facie* evidence of title under the Code. *Stone v. McMahan*, 72
5. In an action at law, by a widow, for dower, a material omission in a certificate of acknowledgment, cannot be supplied by parole proof. *O'Ferrall v. Simplot*, 162
6. Where, by the Code, a party is required to answer under oath, such answer is to be considered evidence in the case, of equal weight with that of a disinterested witness. *Humphreys v. Hoyt*, 245
7. Where the defendant offered to prove by a competent witness, "how much he had paid the plaintiff," the testimony should not have been rejected. *Sinnamon v. Melbourn*, 309
8. Possession of a bond negotiable under the Code, is *prima facie* evidence of ownership; and if such possession is alleged to be fraudulent, the fact can only be established by evidence. *Keeney v. Childs*, 416
9. An officer will be presumed to have done his duty, as commanded, till the contrary appears. *Rowan v. Lamb*, 468
10. Presumptions are allowed when the facts to be presumed are consistent with the duty, trust or power authorized, and tend to subserve the purposes of justice; but where the act would be unauthorized by the trust or office, or contrary to the duty of the party assuming the power, no such presumption can be admitted. *ib.*
11. Where a mortgage is recorded without the certificate of acknowledgment, the record of mortgages should be admitted in evidence in behalf of a person not a party to the

mortgage, to show that he did not receive record notice of it as a valid mortgage. *Brewer v. Crow*, 520

12. A mortgage may be received in evidence against a third party, without proof of its being duly executed, acknowledged and recorded, if such party had actual notice of it, and consented that it might be executed upon the property in which such party was interested. *ib.*

13. Where the evidence is conflicting, and where the court overruled the motion for a new trial, based, in part, upon the insufficiency of the testimony to sustain the verdict, this court will not disturb the judgment, unless it is apparent of record that there was no evidence before the jury upon some point in the case so material that, in the absence of proof upon it, the verdict could not be justified. *Hall v. Hunter*, 539

14. If a declaration, made at the time the act was done, is calculated to explain the character, nature or quality of the facts constituting the act and its effects, so far as to unfold and harmonize them as parts of the same transaction, then such declaration may be regarded as part of the *res gestae*, and should go to the jury with the principal facts in the case. *Prink v. Coe*, 555

15. In an action for injury, sustained by the overturning of a stage coach, the declarations of the plaintiff, made at the time of the injury, are admissible in evidence, as a part of the *res gestae*. *ib.*

16. Parole contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. This rule is especially directed against the admission of any other evidence than that furnished by the writing itself, to explain away the language employed by the parties in making their contract. *Myers v. Sunderland*, 567

17. Evidence *aliunde* not admissible, to show that one of the makers of the note signed the same with the under-

standing that his liability to pay was to be contingent. *ib.*

18. Where the record does not show to the contrary, it will be presumed that the court acted in accordance with the Code.

Brobst v. Thompson, 135

19. If the bill of exceptions does not purport to give all the evidence in the case, it will be presumed that the decision was justified by the testimony before the court. *ib.*

20. It will be presumed that an officer has done his duty, till the contrary appears.

Cole v. Porter, 510

See ATTACHMENT BOND, 3.

BILL OF EXCEPTIONS, 1.

CONTRACT, 3, 4.

DEED, 1.

DIVORCE AND ALIMONY, 6.

ERROR, 2.

MORTGAGE, 2.

PLEADING, 1, 7, 17, 18.

PROMISSORY NOTES, 9, 10.

REFLEVIN, 2.

SATISFACTION, 1.

TRESPASS, 1.

TRUST, 2, 3.

WITNESS, 2, 3, 4, 5.

EXECUTORS & ADMINISTRATORS.

1. A foreign executor has no authority to commence a suit in this state without first filing a bond, and letters testamentary, as required by Laws of 1845. *Karrick v. Pratt*, 144

2. T. commenced suit against F. & Co., for damages sustained to his person by the upsetting of a stage coach; after suit was commenced, T. died, and his wife was substituted as administratrix of his estate, and filed a supplemental bill. On the trial the court instructed the jury that plain tiff could recover damages for

the injury sustained by her on account of the death of T.; held that this instruction was erroneous; that she could not recover for such injury as administratrix, but that she might do so by a proceeding in her own name and right; that as administratrix she could only recover such damages as her husband might have recovered. *Prink & Co. v. Taylor*. 196

3. Where a party appears to have acted under color of title, or has intermeddled only with the lands of deceased, he cannot be regarded as an executor *de son tort*. *Clausen v. Lafrenz*, 224

See HEIRS.

EXEMPTION.

See REPLEVIN, 67.

F

FALSE IMPRISONMENT.

1. In an action for false imprisonment, the defendant may justify by averring, in his answer, that he was acting as city marshal, and that the plaintiff was so disturbing a worshipping congregation as to make his arrest necessary; and that he was only confined until he became sufficiently sober, or until he could be taken before a magistrate for examination. *Hutchinson v. Sangster*. 340

FEEES.

See APPEAL, 6.
WITNESS, 1.

FEME SOLE.

See HUSBAND AND WIFE.

FERRIES.

1. A public ferryman is regarded at law as a common carrier, and is bound to provide suitable boats, landings, fastenings and fixtures. *Whitmore v. Bowman* 148

2. Where a license to keep a ferry does not give to the ferryman the exclusive privilege for a certain distance above and below his ferry, he cannot sustain an injunction against parties who may cross passengers in a skiff within that distance; especially if the petition does not allege that they had no license to keep a skiff ferry, and does not aver that they took pay for crossing passengers. *McEwen v. Taylor*, 532

See NAVIGABLE STREAMS.

FRAUD.

1. Where fraud is set up in defense of a note which was indorsed to plaintiff before due, the answer should charge the holder with notice of the alleged fraud, or that he was a party thereto. *Stein v. Keeler*. 86
2. Fraud is no defense to a note which came into the possession of a *bona fide* holder, without notice, for value, and before due. *id.*
3. Fraud will not be presumed; it must be proved. *Cheuvete v. Mason*, 231
4. Fraud not sufficiently charged, by averring that the coroner and attorney knew that the title of the land sold on execution by the coroner was defective. *Dean v. Morris*, 312
5. A settlement obtained by fraud, or under false entries and computations, is not valid. *Jefferson County v. Ford*, 367

FREEHOLD.

See RAILS.

FORCIBLE ENTRY AND DETAINER.

1. The remedy for forcible entry or detention of real property, not allowable by the Code, where the defendant sets up a paramount title under the third division of § 2362; nor when a question of title is involved. *Bosworth v. Harrenholts.* 440

G

GARNISHEE.

1. Where a notice of garnishment was served within ninety days, and the answer, filed at the next term of court, having been mislaid and a new answer filed: held, that the new answer should be regarded as a continuation of the first; held, also, that as the amount due from the garnishee was for personal services rendered within ninety days next preceding the notice, it was exempt from execution and attachment. *Stockton v. City of Burlington,* 84
2. Where B. testified, on garnishee process, that he executed a note to the defendant, but did not know whether he still held the note or not; and where defendant testified that he held the note, but claimed that the money belonged to his wife, and that he only acted as her agent; held, that as the money was controlled by the husband, without notice of the wife's ownership, and as the note had not been negotiated, judgment should have been rendered against B. as garnishee. *Reeves & Co. v. Jones,* 296
3. Where C., as executor of the estate of P., was garnisheed, and answered that P. was indebted to M. K. & Co. in the sum of \$140; that M. had verbally contracted to buy two lots of P., and to pay \$300 for them, half in printing and half in cash; that the bill of M. K. & Co. was to go in part payment; that "in case the balance of said purchase money

is not paid, and I should conclude to rescind the contract and receive back the two lots, then the estate will be owing about the amount of one hundred and forty dollars;" held, that the court was justified in rendering judgment against the garnishee, to be paid by the estate. *Morgan v. McLaren,* 536

See PROMISSORY NOTES, 5.

GRADE.

See STREETS.

GRAND JURORS.

1. Where the record shows that the requisite number of grand jurors had been empaneled and sworn, and where there was a plea in abatement and demurrer to the bill on the ground that it was found and presented by a less number than fifteen; held, that it was not error to overrule such plea and demurrer. *Hall v. The State,* 73
2. The county judge and sheriff are authorized by the Code, to compare and correct the list of grand jurors, and the deputy sheriff is precluded by § 412, from acting thus in conjunction with another officer; consequently a list of grand jurors compared and corrected by the county judge and deputy sheriff, is not a legal grand jury, and therefore not authorized to find an indictment. *Dudell v. The State,* 125
3. The Code confers no authority upon the prosecutor to challenge the panel or individual members of the grand jury. And as the district court has not the power to select or create, neither has it the power to remove or reform the members of the grand jury. *Keitler v. The State,* 291
4. The policy of the Code is to keep the grand jury independent of control and influence from the district court. 16

5. The right to challenge either the pannel or a member of the grand jury, is limited to the defendant, *ib.*

See INDICTMENT, 1, 9.

GUARDIAN & WARD.

See MINORS, 1.

PARENT AND CHILD, 3.

RECORD, 4.

H

HEIRS.

1. The heirs of an estate can only be rendered liable where an indebtedness is established against an executor, and the assets in his hands prove insufficient, and where the heirs have had a portion of the estate set apart to them. *Reynolds v. May*, 283

See ESTATE, 1.

PRACTION, 5.

HOMESTEAD.

1. Under a contract made in January, 1851, the homestead of the debtor is exempt from execution, by virtue of the act of 1849, to exempt a homestead from forced sale. *Bridgman v. Wilcut*, 563
2. The homestead law, in force at the date of a contract, enters into and becomes a part of the contract, and the right acquired to have the homestead exempt from forced sale, is not impaired by a repeal of the law, *ib.*

See ESTATE, 1.

PRACTION, 5.

HOMICIDE.

See MURDER.

HUSBAND AND WIFE.

1. Where the title of land was in the wife before coverture, a lease executed by the husband alone, cannot affect her rights after a divorce. *Wilhelm v. Mertz*, 54
2. An action for the separate maintenance of the wife may be sustained by her trustee against her husband, on a deed of separation, in which all three were made parties, and which stipulated for immediate separation, for release of all right of dower in the husband's lands, and to keep him harmless and indemnified against all debts contracted by her—such a deed shows mutuality and consideration. *Goddard v. Beebe*, 126
3. Although a husband cannot contract with his wife, he may covenant with her trustee for her benefit. *ib.*
4. At common law the husband is liable for the debts of the wife, contracted *dum solo*, but in order to recover against him, she should be joined in the action and judgment. *Raunecker v. Scott*, 185
5. Under the Code, the husband is not liable for debts of his wife while single, under a contract "purporting to bind herself only." *ib.*
6. Where it appeared that the contract for a working interest in a "lead" was in the wife's separate name, paid for with her own money, and all proceeds received and arrangements conducted in her own name and right; held that the circumstances establish her separate ownership of the "lead," and that parties having full knowledge of all the circumstances, could not hold said working interest or the proceeds thereof to satisfy a debt against the husband. *Ches-vole v. Mason*, 231
7. The right of a married woman to acquire, possess and control property in her own right and for her own benefit, and that it can't be taken to pay the husband's debts unless left under his control without

notice of the real ownership, are fully recognized by the Code. *ib.*

See GARNISHMENT, 2.

PARENT AND CHILD.

SEPARATE MAINTENANCE.

I

INCORPORATION,

See CITIES.

INDICTMENT.

1. An indictment found by a grand jury not legally constituted, should be quashed; but where an indictment is duly exhibited in open court, and indorsed a "true bill," it will be presumed that the list of jurors was legally selected, unless the records of the county show to the contrary. *Dutell v. The State*. 125
2. Where the first indictment was mislaid, a second indictment was found for the same offense, and on motion quashed, and thereupon the first indictment was found; held, that the second indictment did not supersede the first. *Reddan v. The State*, 137
3. An indictment for an assault with intent to inflict bodily injury, should aver in substance that no considerable provocation appeared, or that the circumstances of the assault showed an abandoned and malignant heart. *ib.*
4. An indictment should charge the facts and circumstances constituting the offense in substantial compliance with the law defining the crime. *ib.*
5. An indictment against a house, as a dram shop and nuisance, when a lien is not sought upon the property, need not state the owner's name, nor aver his knowledge of the unlawful traffic. *Our House No. 2, v. The State*, 172
6. Where an offense charged is continuous, as a prohibited traffic, carried on from day to day, it may be laid with a continuando. *ib.*
7. An indictment is good which charges the facts constituting the offense substantially in the language of the Code. *ib.*
8. The mere fact that the indictment was mislaid or stolen after the trial, and could not be sent up with the writ of error, is not sufficient ground for reversing the judgment. *Smith v. The State*, 189
9. Where the indorsement upon an indictment is in substantial compliance, although not in strict accordance, with the Code, it is sufficient if it appears that the indictment was legally found and presented by the grand jury. *Dixon v. The State*, 381
10. In an indictment for stealing "money and bank notes," under the Code, the item money is sufficiently designated by the words, "gold and silver coin," and the term "bank notes" is sufficiently described by the words, "Clark's Exchange Bank bills of the value of twenty-four dollars." The following is also sufficiently descriptive of the bank bills alleged to have been stolen: "Seven dollars of other bank bills, the names of the banks to the jurors unknown, of the value of seven dollars." *Munson v. State*, 463
11. "Bank note" and "bank bill," under the Code, signify the same thing. *ib.*
12. An offense is sufficiently charged in an indictment, if it substantially follows the language of the statute. *ib.*
12. Irregularity in finding the indictment cannot be urged, for the first time, after verdict. *ib.*

14. Where an indictment is in substantial compliance with § 2916 of the Code, it cannot be deemed invalid. *Zumhoff v. State*, 526

See GRAND JURORS, 2.
INTOXICATING LIQUORS, 2, 4, 5, 6.
MURDER, 3, 4, 5, 6, 8.
WITNESS, 6, 7.

INHERITANCE.

1. Where the husband and wife, and their only child were drowned by the same casualty, and where the child surviving its parents for a few minutes, inherited their estate; held, under the Rev. Stat. recognizing the civil law as to degrees of kindred, that the maternal grand-father of the child would inherit the estate in preference to the paternal aunt. *Martindale v. Kendrick*, 307

See DOWER, 5.

INTOXICATING LIQUORS.

1. Those provisions of the Code which prohibit the sale of intoxicating liquors by the glass, and which authorize proceedings *in rem*, against "drum shops," are not unconstitutional, and should be enforced. *Our House No. 2, v. The State*, 172
2. An indictment for retailing intoxicating liquors charged the defendant with being "a retailer of intoxicating liquors by the glass or dram, to be there and then drank, in and about the premises of him, the said William Zumhoff, by consumers and purchasers thereof; and did then and there on divers different and separate times, retail to divers persons, to the jury unknown, twenty glasses or drams of rum, brandy, gin, whiskey and wine, and other intoxicating liquors," &c.; held, that the offense is charged sufficiently specific, and with more descriptive and

explanatory matter than is necessary under the Code. *Zumhoff v. State*, 526

3. Those provisions of the Code which prohibit the sale of intoxicating liquors, by the glass, are not unconstitutional. *ib.*
4. In an indictment against an individual for retailing intoxicating liquors by the dram, it is not necessary to designate the premises upon which the alleged sale was made. It is sufficient if the offense is charged to have been committed in the appropriate county. It is desirable, though not essential, that the town or city be designated. *ib.*
5. Where the offense is charged as defined in the first division of § 925 of the Code, it includes within its meaning that which is described after the word "prohibited" in the last division of this section. *ib.*
6. Where an indictment charges that the defendant had retailed twenty glasses or drams of intoxicating liquors to divers persons, at divers times, it does not thereby present more than one offense, as limited by § 2917 of the Code. *ib.*

See JURORS, 3.

INSANITY.

1. Where insanity is set up as a defense to murder, it should clearly appear that the defendant was laboring under such a mental delusion as irresistibly and uncontrollably forced him to commit the crime. *Fouts v. State*, 500
2. Insanity cannot be set up as a defense to an indictment, unless it appears that the defendant's mind, at the time of the offense, was so deranged that he did not know the nature of the crime, or that he was so really deluded that he did not know he was doing wrong. *ib.*

INSTRUCTION.

1. Although an instruction requested by counsel may state the law correctly, it should not be given, if it assumes facts to be proved as true, which are in issue before the jury. *Luman v. Kerr*, 159
2. Instructions, irrelevant to the issue, should not be given. *Ford v. Jefferson County*, 273
3. Where a correct instruction is asked and refused, it is calculated to mislead the jury, although the substance of the instruction is given in a different form. *Webster v. Raver*, 426
4. In an action upon an attachment bond, it is error in the court to refuse instructions asked in reference to damages, when such instructions were in strict accordance with the Code. *ib.*
5. On an indictment for marking and defacing a school house, the court instructed the jury that, "The state had proved all that was necessary in reference to the school district;" held, that this was charging the jury on the facts, and therefore erroneous. *Houston v. State*, 437
6. Instructions given or refused by the court below, are no part of the record unless made so by a bill of exceptions; nor will this court disturb the action of the court below, unless it appears that exception was taken to the ruling of the court, in reference to such instructions. *Parker v. Pierce*, 452
7. If an instruction asked, appears to be legally correct, the refusal of the court to give it will not be deemed erroneous, unless it appears to have been applicable to the case. *Hall v. Hunter*, 539
8. A court is justified in refusing an instruction which is calculated to mislead the jury, although it may state a principle of law correctly; or the court may give such instruc-

tion in a modified form, so as to present the law applicable to the facts, more appropriately and intelligibly to the jury. *ib.*

9. Where an irrelevant instruction was given, which could not prejudice appellant, the judgment will not be reversed. *Sullivan v. Finn*, 544

See EXECUTORS AND ADMINISTRATORS, 2.
MURDER, 9.

INSURANCE.

1. Where an insurance policy stipulated that the company should not be liable to pay the loss till after sixty days, and where the petition was filed against the company, before that time; held, that this premature proceeding might be corrected by a supplemental petition. *Franklin Insurance Co. v. McCrea*, 239
2. Any want of validity in the notice upon the agent of an insurance company is waived by subsequent appearance. *ib.*

J

JOINT TENANTS AND TENANTS IN COMMON.

1. Where G. as a tenant in common, with minors who had no guardian at law, made necessary and valuable repairs to a mill, and where the maternal guardian of the minors acquiesced in such repairs; held, that G. is not entitled to the exclusive possession of the premises until reimbursed for the amount expended by him for such repairs. *Young v. Gammel*, 207
2. Two of three joint tenants cannot agree upon a division of their land that will be binding upon the third. *Cooper v. Frederick*, 403

JUDGMENT.

1. A judgment by default should not be rendered against a party not personally served, until the court is satisfied that every requirement of the Code, in reference to the notice, has been performed. *Pinkney v. Pinkney*, 324
2. A judgment, until reversed, is conclusive of every issue that was or should have been tried under the pleadings, but it is not conclusive of facts that were not in issue, nor admitted by the pleadings, and therefore, if connected with an order to sell property under attachment, it is not conclusive that the property was not exempt from execution. An order to sell property, made at the time and in connection with a judgment, is independent of the judgment, and may be revoked or defeated by a replevin of the property without impairing the judgment. *Wilson v. Stripes*, 551

See STEAMBOAT LIEN, 1.

JUDICIAL SALE.

1. B. claimed title under a mortgage, dated April, 1841, and duly recorded; decree of foreclosure in May, 1842; sale in October following, and sheriff's deed executed and filed for record October 27, 1843. H. claimed title under a judgment obtained October 7th, 1843, sheriff's deed to R. and J., executed and recorded in March, 1844, and in July, 1846, deed from R. and J. to H.; held that the delay in executing the sheriff's deed to B. could not prejudice his title, and that the deed to B. related back to the sale, decree and mortgage, and secured to him the title over H. *Bell v. Hall*, 68
2. A sheriff sold several lots, on execution, to C., the brother and agent of the execution defendant, who failed to pay the purchase money; the sheriff thereupon "proclaimed the postponement of the sale" from the 17th to the 24th of August, at

which time the property was sold to H.; held, that as the adjournment was proclaimed by the sheriff, as the defendant's agent was present and had notice of the adjournment, and as it was occasioned by him, the sale was not void in consequence of such postponement; held, also, that although H. was present at the first sale, and had notice of the adjournment, it does not follow that he could be charged with notice of irregularities. *Coriell v. Ham*, 455

3. Where the judgment was rendered in 1842, and the execution issued and the sale took place in 1844; held, that the sheriff's deed delivered to the purchaser on the day of sale, did not invalidate the sale, nor impair the execution defendant's right to redeem the land under the law of the contract. *ib.*
4. It is the policy of the law to protect judicial sales. *ib.*
5. The majority opinion in *Tiffany v. Glover*, 3 G. Greene, 387, overruled, and the principles laid down in the dissenting opinion, in that case, adopted. *Rowan v. Lamb*, 468

See SHERIFF'S SALE.

JURISDICTION.

1. Where a power is not expressly conferred, nor necessarily inherent in the court, it cannot be assumed under an inference of law. *Kettler v. The State*, 291
2. A court of inferior or limited jurisdiction must show in its records, or in its judgments, that it has jurisdiction over the subject matter and the parties. If it in any way appear that such a court has jurisdiction, it will be inferred that its proceedings were regular. *Rowan v. Lamb*, 468
3. Every vital jurisdictional fact must be apparent; and while we cannot merely presume the existence of

such a fact, we cannot presume against it, even to divest an inferior court of jurisdiction; so in attachment proceedings, the court will not presume the jurisdictional fact of a levy; but where that fact is established by the officer's return, or otherwise, a court may call in the aid of presumption to support a mere detail or incident connected with the levy, to show that the officer obeyed the directions of the law in making the levy. *ib.*

4. An attachment proceeding does not curtail or limit the jurisdiction of the court, before which it may be pending; and if before a court of general jurisdiction, like the district court, the same general intendments apply in regard to the exercise of official duties, as apply to any other case of general jurisdiction; and where there appears to have been a writ founded upon the requisite affidavit, and where the officer appears to have complied with the mandate of that writ by making the requisite levy, that levy gives the court jurisdiction over the property attached. *ib.*

5. Where an objection to jurisdiction was not raised in the court below, it will not be entertained in the supreme court. *Bridgman v. Wilcutt*, 563

6. By appearing and pleading, the defendant admits the jurisdiction of the court. *ib.*

See ATTACHMENT, 18.

CHANGE OF VENUE, 2.

EQUITY, 3, 4.

JURORS.

1. The officer having a jury in charge should not speak to them while deliberating upon their verdict, except to ask them if they have agreed. *Cole v. Swan*, 32

2. The right to challenge jurors under the Code is unconditional, and any ruling of the court calculated to

restrict that right; or to make the defendant's right dependent upon the exercise of the same right by the State is erroneous. *Smith v. The State*, 189

3. A jury, empaneled to try the defendant on an indictment for retailing intoxicating liquors, were sworn "the truth to speak," &c., without being sworn "to try the issue joined," as required by the Code; held, that the jury were not legally sworn. *Dixon v. The State*, 361

See GRAND JURORS.

JUSTICE OF THE PEACE.

1. In an action of trespass before a justice of the peace, a petition was filed, and during the trial was mislaid, but was subsequently found, and on appeal to the district court was sent up with the transcript; held that the petition need not be copied into the docket, and that as the petition and docket together showed a cause of action, the case should not be dismissed. *Boon v. Orr*, 304

2. The Code, in directing oral pleadings to be reduced to writing by the justice of the peace, is directory and a party should not be prejudiced if he neglects that duty. *Sinamon v. Melbourne*, 309

3. On a trial before a justice of the peace, a general denial of indebtedness will be presumed, if nothing appears to the contrary. *ib.*

4. The neglect of a justice to make his returns to the district court, at least five days before the next term, is not good ground for dismissing the appeal. *Whitcomb v. Holloway*, 311

5. In commencing an action before a justice of the peace, by notice, such notice should contain all that is required by §§ 2272, 2273, 2274 of the Code. *Melbourn v. Foote*, 346

6. In actions commenced before a justice of the peace, strict formality and regularity in pleadings will not be required where the provisions of the Code are substantially observed. *Burton v. Hill*, 379
7. On appeal from a justice of the peace, it is error to render judgment against the defendant, unless the transcript or some paper on file in the case shows the amount and nature of plaintiff's demand. *Sears v. Tubbs*, 409
8. A petition is not necessary before a justice of the peace; but if the suit is upon a note or account, it should be filed with the justice. *ib.*
9. The transcript from a justice of the peace should contain a brief statement of plaintiff's demand. *ib.*
- See* APPEAL, 8.
PLEADING, 15.
TRANSCRIPT, 12.
- lessor, agreeable to the original contract or lease. *ib.*
3. Where a landlord takes possession of the premises before the expiration of the lease, without the consent or surrender of the lessee, he is a trespasser, and liable for damages. *ib.*
4. Where land is rented upon shares, the tenant is exclusive owner of the crop, while it is growing, and the landlord is liable to him for damages, if he harrows up the ground sowed with grain, even if no amount of damage is proved. *ib.*
5. A lease of land for a share of the grain produced is not terminated by a failure of the crop. *ib.*
6. In an action by a landlord to recover a balance on rents, the tenant cannot object to instructions given by the court in support of the landlord's right to the premises. *Sullivan v. Finn*, 544

L

LANDLORD AND TENANT.

1. Where a lessee bestowed labor and improvement upon the ground rented on shares, by cultivating the same and by putting-in seed furnished by the lessor; and where the lessor took possession of the premises in the spring, before the crop could mature without the consent of the lessee, and harrowed in a crop of spring grain, for the reason that the tenants crop was frozen out; held that the lessor was liable to the lessee for at least the amount and value of such labor. *Rees v. Baker*, 461
2. Where land is rented to the lessee for the purpose of raising a crop of winter wheat, on shares, and the wheat is killed out by the severity of the winter, the landlord cannot be justified in taking possession of the leased premises, unless surrendered to him by the lessee, or unless the lessee refuses to put in a crop of spring grain, and share the crop with the
- LANDLORD AND TENANT.
1. Unless a lease has been acknowledged and recorded according to law, it is valid only between the parties thereto and such as have actual notice thereof. *Wilhelm v. Merts*, 54
- See* HUSBAND AND WIFE.
- LARCENY.
- See* INDICTMENT, 10.
- LEVY.
1. A levy upon personal property to a sufficient amount to satisfy the debt,

is not of itself satisfaction ; not so at least as between the parties to the execution, although it may be so regarded as to third parties. *Williams v. Gartrell*, 287

2. Where, under attachment, a legal levy has in fact been made, a mere omission in the returns to state the particulars in reference to the levy, or the ownership of the property attached, will not impair it, nor affect the jurisdiction of the court over the property. *Rowan v. Lamb*, 468

M

MANDAMUS.

1. Where the court decided that there were two hundred dollars in the hands of H., as school fund commissioner, belonging to R., and where the order of the court was presented to H., with a demand of payment, a refusal on his part would justify a mandamus, to compel performance. *Hillis v. Ryan*, 78

MASTER AND SERVANT.

1. A master may do that to protect his apprentice, which under other circumstances would be an assault or give considerable provocation for one. *Orton v. The State*, 140

See ASSAULT, 1.

MECHANIC'S LIEN.

1. Where W. agreed to enter forty acres of land for R., in payment for digging a cellar, but neglected to enter the land and refused to pay the money ; held, that R was entitled to a mechanic's lien. *Reiley v. Ward*, 21

2. A mechanic's lien may be enforced where payment was to be made in

land or property,

ib.

3. Where the payee was entitled to a mechanic's lien on a promissory note, he does not waive or forfeit his lien by indorsing the note and leaving it for a time with a third party as collateral or otherwise, unless it appear that he actually transferred all right to the note. *Hawley v. Ward*, 36

4. A mere attempt to negotiate a note on which a lien might be established does not amount to a waiver of such lien. ib.

5. A note given on a claim which would authorize a mechanic's lien was indorsed by the payee in blank ; held, that if the indorsement indicated the belief that the note had been negotiated, the plaintiff should be permitted to prove the contrary. *Scott v. Ward*, 112

6. The acceptance of a note is not a waiver of a mechanic's lien ; but if such note should be actually negotiated, the lien would be lost. ib.

7. In an action for a mechanic's lien on a running account for material, furnished during the progress of the improvement, in the absence of proof to the contrary, the date of the last item in the account will be regarded as " the time payment should have been made," in order to bring the account within one year limited by the Code. *Merchand & Co. v. Cook*, 115

MINERS' BANK OF DUBUQUE

1. The trustees of the Miners' Bank of Dubuque, appointed under the act repealing the charter of that bank, were not authorized to employ an attorney, to be paid from the assets of the bank, to carry on a *quo warranto* suit against the officers of the bank. The trustees were only authorized to settle the affairs of the bank, and could not be justi-

fied in paying from its assets, an attorney for doing that which had already been done by the legislature in repealing its charter. *Miners' Bank v. Thomas*, 336

MINORS.

1. Minors do not possess the legal capacity to dispose of their right of possession in realty by lease or other contract, nor can their natural guardian do so without authority from the proper court. *Young v. Gammel*, 207

2. The power to manage the estate of minors can only be derived from the county court under the Code, *ib.*

MORTGAGE.

1. Where R. undertook to advance sufficient money to satisfy two judgments against M., and as security for such advance and twenty per cent. interest, it was arranged that R. should bid off the land under execution in his own name, and receive the rents therefrom, and when the rents received amounted to more than enough, to refund the money advanced and twenty per cent. interest; held, that the transaction shows an intention to create and secure an indebtedness from R. to M., and that the sheriff's deed to R. should be regarded as a mortgage, which was satisfied by the rents collected. *Roberts v. McMahan*, 34

2. Oral evidence not admissible to contradict or vary a written instrument, but under the exception to this rule, it may be shown by extraneous proof that a deed, absolute on its face, was intended as a mortgage, *ib.*

3. Where a mortgagor had sold his equity of redemption, and all right to the property subject to the mortgage, he need not be made a party to the bill of foreclosure. *Murray v. Chittett*, 108

4. A mortgage was given to secure notes signed by M. as principal and H. as security, and H. having paid the note last due, took an assignment of the mortgage; held, that the payment of the note by the surety did not discharge the mortgage lien, and that H. as such surety, was entitled to the benefit of that security, to reimburse him for the payment he had made. *ib.*

5. In an action against the mortgagee to recover the balance due on the mortgage and note, after applying the proceeds from the sale of the mortgaged premises; it was held, that as the mortgagee had not indorsed the note, there was no cause of action against him. *Wood v. Sands*, 214

6. Where a mortgage is annexed to the petition, and is not denied by the answer, it is not necessary to prove its execution. *Brewer v. Crow*, 520

See EVIDENCE, 11, 12.
JUDICIAL SALE, 1.

MURDER.

1. The words "with malice aforethought," are necessary in defining murder, either in the first or second degree, and in order to charge murder in the first degree, the indictment should also allege the killing to have been "willful, deliberate and premeditated," or that it was done in perpetrating some one of the crimes enumerated in § 2569 of the Code. *Fouts v. State*, 500

2. The distinction between murder in the first and murder in the second degree, under the Code, defined. *ib.*

3. An indictment alleging the killing to have been "willfully, feloniously and unlawfully" done, and also "with malice aforethought," is not sufficiently descriptive of the crime of murder in the first degree, but it is sufficient for the crime of murder in the second degree. *ib.*

4. An indictment for murder in the first degree is not good, unless it shows the murder to have been committed in some one of the methods specified by § 2569 of the Code. *ib.*
5. A good indictment for murder at common law, will not include murder in the first degree, under the Code. *ib.*
6. Where the statute uses descriptive language to define an offense, that language must be followed in the indictment, or words of the same meaning must be used. *ib.*
7. The words "with malice aforethought," do not include nor mean the same as the words "deliberate and premeditated." *ib.*
8. A prisoner cannot be made to suffer the penalties of murder in the first degree, under an indictment which is good only for murder in the second degree, nor can the jury go beyond the indictment by finding the defendant guilty in a higher degree than he stands charged. *ib.*
9. The court charged the jury that if a design to kill was formed, "at the time the blow was struck with the knife, it is a willful, deliberate, premeditated killing, and therefore murder in the first degree;" held, that this is erroneous; that in order to constitute murder in the first degree, the design should be formed before the blow was struck. *ib.*
10. To navigate the river is paramount to a ferry franchise, and therefore a steamboat is not required to wait for a ferryman to lower his cable, so as to run any risk or suffer any damage from the delay. *Steamboat Globe v. Kurtz*, 433
11. A ferry cable extending across a navigable stream should be so managed as not to be an obstruction to navigation, and so as to cause neither inconvenience or damage to boats. *ib.*

NEW TRIAL.

1. A motion for a new trial is addressed to the sound discretion of the court, and should be refused unless a strong meritorious case is shown. *Humphreys v. Hoyt*, 245
2. Where by consent, a jury is waived and the facts are submitted to the finding of the court, on a motion for a new trial, the case is to be considered the same as if tried by a jury. *ib.*
3. A new trial will be granted when it appears that the merits of the case have not been fully tried and that injustice has been done. *ib.*

See EVIDENCE, 13.

NOTICE.

1. The notice provided by the Code not a "process," and need not be in the style of "the State of Iowa." *Nichols v. Burlington and Louisa County Plank Road Co.*, 42
2. Where the notice informs defendant that the petition is to be filed "in the office of the clerk of the district court of Des Moines county," it sufficiently designates the court before which the proceeding is commenced. *ib.*
3. Actual notice can only be given

See INSANITY.

N

NAVIGABLE STREAMS.

1. The Des Moines River is a navigable stream and a public highway, consequently a steamboat may lawfully navigate the same; and although a ferry may be legally established upon that river, it must be so conducted as to avoid obstructing its navigation. The right to
2. Actual notice can only be given

by express information or personal service. *Wilhelm v. Morris*, 54

be authorized by publication. *Trask v. Key*, 372

4. A notice is not defective which called upon defendant to answer by the 12th day of the month—the 12th being the first day of the term—on the second day of the term. *Lemonds v. French*, 123

12. Before a defendant can be considered in default, on a notice by publication, it should appear that a copy of the petition and notice had been directed to him through the post office, as required by the Code. *ib.*

5. Section 2497 of the Code, authorizing the services of notice through the post office, when the parties reside at different places between which there is regular communication by mail should be strictly observed, and courts should carefully guard against any abuse of its provisions. *Smith v. Smith*, 266

See APPEARANCE, 1, 2.

DEPOSITIONS, 1.

INSURANCE, 2.

JUSTICE OF THE PEACE, 5.

LEASE, 1.

PLANK ROAD COMPANY, 2.

SERVICE BY PUBLICATION.

6. A notice addressed to Mrs. R. L. Smith, to a post office in a city where she had been always known and addressed as Mrs. Asahel L. Smith, is not sufficient, when it was known by the party sending the notice, that she was absent from said city. *ib.*

7. A notice by publication not valid, unless ordered by the court, after the original notice was returned "not found," to the court, at the appearance day therein designated. *Pinkney v. Pinkney*, 324

1. Where A. gave W. an order on E. for apple trees, and E. refused to honor the order; held, that the order would not become a money demand against A., the drawer, without a demand and refusal as provided by the Code, § 959. *Whipple v. Abbott*, 66

8. An affidavit or proof that a notice and petition were directed through the post office, as required by the Code, should show that the post office to which they were mailed was the usual residence of the defendant, and that they were mailed in sufficient time before the appearance term. *ib.*

9. A notice should designate the hour of appearance, and is therefore defective if it names the hour as "11 o'clock, M." *Hodges v. Brett*, 345

10. Where jurisdiction depends upon the notice, there should be a strict observance of the statute. *ib.*

11. The original notice for personal service should be returned to the court "not found," before notice can

O

ORDER.

P

PARENT AND CHILD.

1. Section 1485 of the Code, directing an order concerning children after a divorce is decreed, the court in acting, "as shall be right and proper," should observe the legal rights of the parents, the child and the community. *Hunt v. Hunt*, 216

2. Where the child is of such age that it can, without injury, be withdrawn from maternal nursing, the father has legal right to its custody, society and service, and is legally liable for its support and education. *ib.*

3. A court should not assume the wardship of a child, unless the parent labors under a moral and

natural disability which would disqualify him for the performance of his duties to the child. *ib.*

4. The consent of the father that the mother might have the custody of the child for the time being, cannot deprive him of his superior right to the child, no more than such consent would not release him from his obligations to the child. *ib.*

PARTIES.

1. Where it appeared that a note belonged to a voluntary association of individuals not incorporated, and that the plaintiff had no interest therein, the court should find for defendant. *Nightingale v. Barney*, 106

See HUSBAND & WIFE, 4.
WITNESS, 2.

PARTNERSHIP.

1. Parties may be regarded as partners in relation to third persons, under facts and circumstances much less conclusive than would be necessary to establish a partnership between themselves. *Stanchfield v. Palmer*, 23
2. Where a petition seeks a specific performance, and the settlement of a partnership business, it should set forth the amount of capital invested by each partner, the method of carrying on the business, and the leading facts and conditions upon which the partnership was formed, and under which plaintiff seeks to recover. *Cooper v. Frederick*, 403
3. A settlement of accounts between two partners cannot be binding upon the third partner, without his consent. *ib.*
4. In making a final settlement between partners, and a division of the lands, the court should examine into all the circumstances, rights

and equities of the respective partners, and arrange the settlement and division accordingly. *ib.*

PLANK ROAD COMPANY.

1. Under the articles of incorporation, the Burlington and Louisa County Plank Road Company was authorized to commence business and call for installment on stock as soon as five thousand dollars were subscribed. *Nichols v. Burlington and Louisa County Plank Road, Co.*, 42

2. A general notice to stockholders is sufficient notice to those who subscribed conditionally. *ib.*

PLEADING.

PETITION, 1.

1. In an action for damages to personal property, the articles should be so specified as to inform the defendant of the extent of the action, and proof to be adduced against him; and hence when the petition claimed for damages to "furniture, &c.," it was error to admit proof for injuries done to coffee, sugar and apples. *Whitmore v. Bowman*, 148
2. Where the petition seeks to recover an amount subscribed to the capital stock of a plank road company, a copy of the subscription paper should be annexed to the petition. *Hudson v. Plank Road Co.*, 152
3. An amended petition should appertain to the same rights of the party plaintiff as the original petition, and should not set up other rights affecting other parties. *Plank v. Taylor*, 196
4. A petition seeking to recover against one as on a several promise, cannot be supported by a joint note against two which contains no several promise. *Roop v. Seaton*, 252
5. Under the Code, the petition need

- not claim or assume any particular form of action. *Pitkins v. Boyd*, 255
6. If the averments indicate a substantial ground of action, it is sufficient. *ib.*
7. Presumptions of law need not be averred or proved. *Ferguson v. State*, 302
8. Where a petition is founded upon an attachment bond, the allegation that "the attachment was wrongfully sued out with willful wrongfulness," need not be accompanied with the averment that the defendant had no sufficient reason to believe the facts in the attachment affidavit to be true. *Abbott v. Whipple*, 320
9. Where the plaintiff was permitted to file amendments to his petition, it is error to refuse leave to defendant to amend his answer. The Code favors amendments to pleadings. *Logan v. Tibbotts*, 389
10. Under the Code, two or more causes of action may be united in the same petition. Hence an action on a contract performed may be united with an action on account, and both be included in one account. This will not preclude either party from using the contract as evidence of the items therein designated. *Buford v. Funk*, 493
11. Where a special contract had been fully performed by plaintiffs, and nothing remained but defendant's liability to pay the money, a general petition on account may include such amount due on the special contract. *ib.*
12. Where a written agreement is set out in the pleadings and recognized, it is not necessary to prove it. *Brewer v. Crow*, 520
- ANSWER, 2.
13. An answer, under the Code, should specifically deny; or admitting, should set forth that which would justify and avoid every material allegation in the petition. *Hutchinson v. Sangster*, 340
14. Where the defendant, in an action of trespass, answered that he took the goods, as sheriff, by virtue of a writ of attachment, a copy of which was annexed to his answer; and where such writ appeared to have been materially defective held, that a demurrer to the answer should be sustained. *Deforest v. Swan*, 357
15. In a case commenced before a justice of the peace, the defendant answered that, "he had paid, and over-paid plaintiff for all items of account;" held, that this should be considered a denial of plaintiff's demand; and not as a new affirmative allegation, to be taken as true, if not denied. *Burton v. Hill*, 379
16. An answer to a petition in replevin, after denying the averments of the petition, alleged in reference to the property described in the petition, "that he, the said defendant, is rightfully entitled to the property, and to the possession thereof;" held, that this allegation is not new matter, and amounts to nothing more than a cumulative responsive denial of plaintiff's rights, and need not be specifically denied, under § § 1741 and 1742 of the Code. *Hunt v. Bennett*, 512
- DEMURRER, 3.
17. Upon a demurrer to evidence the testimony is to be taken most strongly against the party who demurs. *Slanchfield v. Palmer*, 23
18. A demurrer to evidence not only admits the truth of the testimony, but also the conclusions of fact which may be reasonably inferred from such testimony. *ib.*
19. Where a demurrer to a petition is only applicable to the attachment proceeding, an erroneous ruling, in relation to such demurrer, cannot affect the judgment on the merits. *Crow v. McClung*, 153
20. The non-joinder of one of two

joint payors of a promissory note, cannot be set up as a bar to the action in the answer, but would be good cause for demurrer. *Roop v. Boston*, 252

21. Where a demurrer to a petition is sustained, and an amended and correct petition thereupon filed, this court will not review the ruling below in reference to the original petition. *Gillis v. Matthews*, 254

22. Where defects are corrected by an amended petition, the overruling of the demurrer in reference to those defects, is waived by answering over. *Ford v. Jefferson County*, 273

23. An amended answer supersedes the original, and waives all objection to the demurrer affecting such original answer. *ib.*

24. The common law rule that a demurrer reaches back to the first defective pleading, is not applicable to pleadings under the Code. *Gano v. Gilruth*, 453

25. A demurrer should specify the precise ground of objection, and show in what respect the pleading is claimed to be legally insufficient. *Cole v. Porter*, 510

26. When a defendant abides by his demurrer to the petition, the court will be justified in rendering a judgment agreeable to the prayer of the petition, on overruling the demurrer. *Bridgman v. Wilda*, 563

See ATTACHMENT, 1, 5, 7, 8, 10, 11.

ATTACHMENT BOND, 15.

BAIL BOND, 1.

COUNTY COURT, 5.

DIVORCE AND ALIMONY, 3, 4, 5.

EQUITY, 6, 7, 8, 9, 10, 11.

EVIDENCE.

GARNISHMENT, 1.

GRAND JURORS, 1.

INSURANCE, 1.

JUSTICE OF THE PEACE, 2, 3, 6.

FALSE IMPRISONMENT, 1,

PROMISSORY NOTES,

PRACTICE, 1, 2, 5.

SURE FACIAS, 1.

STATUTE OF LIMITATIONS, 3.

VARIANCE, 1

POSSESSION.

See CONTRACT, 2.

PRACTICE.

1. The pleadings should all be in, and the issue made up, before the jury is sworn. *Cole v. Swan*, 32

2. Every failing demurrant has a right to plead over, upon such terms as the court may direct. To refuse such right unconditionally is erroneous. *Hillis v. Ryan*, 78

3. A decree by default should not be entered while there is a material motion or answer pending. *Coffin v. Kemp*, 119

4. A cause should not be dismissed at the first term after the petition was filed, on the ground of defective notice. *Lemonds v. French*, 123

5. A suit commenced by attachment against "the heirs of Otis Reynolds," does not sufficiently designate the defendants, under the Code, § 1694. *Reynolds v. May*, 253

6. Where judgment was not rendered by default, and the question of damages is submitted to the jury, the defendant's right to address the jury is not disturbed by the Code, § 1831. *Hutchinson v. Sangster*, 340

7. Where the proceedings of a county court are taken to the district court by appeal, and *prima facie* appear unauthorized and extra judicial, the proceedings and appeal may be dismissed on motion. *Hall v. McMahon*, 376

8. After a cause has been tried before a justice of the peace, and been taken

by appeal to the district court, where the venue was changed and the cause continued, it is too late to submit a motion to dismiss on the ground of variance between the petition and notice. *Prink & Co. v. Whischer*, 382

9. A decree should not give more or greater relief than is claimed in the petition. *Cooper v. Frederick*, 403

10. In an action upon a special contract, evidence of a contract, materially different from that upon which suit is brought, may be excluded. *Bebe v. Brown*, 406

11. Where a purchase was made under an agreement to pay a certain amount at a future day, and to give a note for the same; and where the purchaser refused to give the note, the amount, in consequence of such refusal, cannot be considered as due before the time stipulated. *Hall v. Hunter*, 539

12. If a party agrees to give the note of a third party, in full payment of a balance due from him, and fails to deliver the note, as agreed, when requested, the amount may be sued for as a cash demand. *ib.*

13. A party cannot sue for and recover money before it becomes due, even if the debtor refuses to give his note for the amount payable at the time stipulated. *ib.*

14. After a trial upon the merits, without objection to the pleadings, the judgment will not be reversed because a replication was not filed. It will be presumed that the replication was waived. *Sullivan v. Finn*, 544

See APPEARANCE, 3.
CONTRACT, 5.
DAMAGES, 1.
EVIDENCE, 7.
MORTGAGE, 3.
NEW TRIAL, 2.

PRE-EMPTION.

See DOWER, 6.

PRINCIPAL AND AGENT.

1. Where the name of the principal and the relation of the agent be stated in a note or contract, and the agent is authorized to make such note or contract, the principal alone is bound, unless the intention is clearly expressed to bind the agent personally. *Baker v. Chambliss*, 428
2. A party to a contract should be personally bound, unless his agency is disclosed; but in deciding whether the apparent agent or his principal should be bound, the presumption is that such agent intended to bind his principal. *ib.*

PROCESS.

1. All process issued by the clerk of any district court must bear test in the name of the clerk; but the signature may be regarded as a part of the test, and where referred to in the test as "witness my hand," &c., it is sufficient without repeating the name in the body of the test. *East v. Parks*, 80

See NOTICE, 1.

PROMISSORY NOTES.

1. Where the maker of a note promised to pay a stated sum in cabinet furniture at his shop, under a contract in writing that the cash prices at the date of the note should govern, and where the note was assigned after it became due; held, that the contract was a part of the transaction, and that it was not necessary for the maker to set apart the furniture, and that a demand and refusal were necessary before suit upon the note as a money demand. *Frederick v. Remking*, 56
2. Where a note payable in property or labor fixes the time of performance, no demand is necessary. *Barker v. Brink*, 59

3. If the indorsement of a property note shows the plaintiff to be the holder when suit is commenced, it is sufficient. *ib.*
4. Section three of revised statutes, p. 453, is applicable only to instruments assigned after due. *Stein v. Keeler*, 86
5. A note transferred before due, and in good faith, cannot be avoided by a subsequent payment on garnishee process, but such payment would be good against an assignee, who fraudulently obtained the note to defeat the creditors of the payee. *Gillam v. Huber*, 155
6. A note not made payable to bearer, should be transferable by indorsement, or else sued in the name of the payee, or his legal representative. *Dawson v. Jewett*, 157
7. A note is not negotiable by delivery only, unless made payable to bearer. *Mainer v. Reynolds*. 187
8. Where a note, not negotiable by delivery, is issued in the name of the indorser, a copy of the indorsement should be annexed to the petition. *ib.*
9. In an action by the indorser of a note where the defendant pleads failure of consideration, and the court instructs the jury that they must be satisfied that the plaintiff had notice of the failure before the note was assigned, it will be presumed that the note was indorsed before due, unless the record shows to the contrary. *ib.*
10. The date of a note given for services on a steamboat, is not conclusive that the services were rendered at or before such date, so as to give priority of lien for such services, over a seizure and levy made at the same date of the note. *Miller v. Galland*, 191
11. An unsatisfied judgment against one of the payors of a joint and several note, is no bar to an action against the other. *Harlan v. Barry*, 212
12. Where the appearance of the note is the only evidence of an alteration in the date, or where such alteration does not appear to be material, the validity of the note should not be affected. *ib.*
13. One of two makers of a several or joint and several note, cannot avoid payment for a want of consideration by showing that the other maker of the note received the entire consideration from the payee. *Myers v. Sunderland*, 567
- See CONSIDERATION, 1.
FRAUDS, 1, 2.
MECHANIC'S LIEN, 3, 4, 5, 6.
PARTIES, 1.
PLEADING, 4, 29.
- ## R
- ### RAILROADS.
1. A county has the constitutional right to aid in building a railroad within its limits. *Dubuque Co. v. Dubuque and P. Railroad Co.*, 1
2. The proceedings under which the citizens of Dubuque county voted two hundred thousand dollars to aid in constructing the Dubuque and Pacific railroad through that county, were regular, and authorized by law. *ib.*
3. Section 114 of the Code applicable to railroads. *ib.*
4. In submitting to the voters of a county a proposition to have the county issue bonds for stock in a railroad company, the form of the vote is sufficiently explicit when it reads: "For the Lyons Railroad," or "Against the Lyons Railroad." *The State v. Bissell*, 398
- See COUNTY BONDS, 1.

RAILS.

1. Rails, laid up in a fence inclosing a field, or a portion of a field, are a part of the freehold, although the fence is not staked with stakes sunk into the ground. *Smith v. Carroll*, 146

See EVIDENCE, 1.

SALE, 1.

RECORD.

1. Motions, notices, and the rulings of the court in a case, are to be deemed parts of the record, under the Code. *Lemond v. French*, 123
2. In a joint prosecution against two persons for uttering counterfeit money, separate bail was given by defendants; a default was entered against them, and a *scire facias* issued against them and their sureties in the recognizance; held, that the court erred in rejecting part of the record entries offered by the state, to show that the defendants were in default, and had forfeited the conditions of the bail bonds; held, also that the record in such a proceeding is an entirety; that the proceeding is joint and several, and the taking of separate bail, would not, under the joint record, be inadmissible. *The State v. Lighton*, 278
3. The attestation of a record may be according to the form used in the state from which the record came. *Roop v. Clark*, 294
4. Letters of guardianship from a probate court of Ohio, admitted as good, when the probate judge certifies that by law, he is his own clerk, and that the certificate is in due form. *ib.*

REDEMPTION.

See SHERIFF'S SALE, 8, 10.

RE-HEARING.

See SUPREME COURT, 2.

REPLEVIN.

1. Where the possession of property was not acquired wrongfully in an action of replevin, there should be evidence of a demand and refusal; but if the property was illegally taken no demand is necessary. *Stanchfield v. Palmer*, 23
2. In an action to replevy saw logs, there should be proof that the identical property had been owned by plaintiff. *ib.*
3. Where a store-house and the goods therein were in possession of the sheriff, by virtue of a writ of attachment; and where the attachment defendant instituted an action of replevin, and in the writ and petition described the property as being "a certain storehouse, warehouse, and the goods therein contained, being the store in Council Bluffs, known and designated as the store of your petitioner;" held, that the description was sufficiently certain. *Ellsworth v. Henshall*, 417
4. If a store containing the goods to be replevied is so described as to designate it from all other stores in the place, it is sufficient. *ib.*
5. In an action of replevin, where the jury return a verdict, "We the jury find a verdict for the defendant of fifty dollars," it is not error in the court to refuse a judgment ordering the property to be restored to the defendant. Such a verdict is not inconsistent with plaintiff's right to the property. *Hunt v. Bennett*, 512
6. Where property exempt from execution is taken on attachment, the fact may be shown on motion to dissolve the attachment, or on motion to have the property released. But if the party fails to avail himself of such motion, it does not follow that his right to the property is forfeited, or that he may not recover in an action of replevin. *Wilson v. Stripe*, 551
7. The action of replevin is authorized by the Code to recover the posses-

sion of personal property taken on legal process, if it was exempt from seizure by such process. *id.*

8. A judgment with an order to sell property under attachment, is not a bar to an action of replevin for the property, on the ground that it was exempt from execution. *id.*

See PLEADING, 16.

RESCISSION OF CONTRACTS.

1. Although the rescission of a contract is the converse of a specific performance, still such rescission requires a stronger cause, ordinarily, than to resist a specific performance. *Brainard v. Holsapple*, 485

REVENUE LAWS.

1. The revenue laws of the state authorize the sale of land for taxes, and the subsequent proceeding to foreclose the equity of redemption is not unconstitutional. In general the provisions of the Code may be enforced. *Partridge v. Corkery*, 383

ROADS AND HIGHWAYS.

See COUNTY COURT, 2.

S

SALE.

1. Where a party sells rails and receives payment, but fails to furnish or deliver them, he is liable to the vendor for their value. *Johnson v. Patten*, 63

2. The rule that a sale of property is not complete, when anything remains to be done by the vendor, such as measurement in order to ascertain the quantity, &c., applies only to cases of constructive delivery. *Bogy v. Rhodes*, 133

3. Where N. contracted with W. to sell him a cow, and W. directed the cow to be delivered at his slaughter house, under the stipulation that he would pay as much for her as if he had previously seen her, and where N. delivered the cow as directed, and W. not finding her as good as he expected, directed her to be turned loose, whereby she was lost; held, as the sale was absolute and the price only conditional, that W. was liable to N. for the value of the cow; held, also, that if the sale had been conditional, he would still be liable as bailee for gross negligence. *Neely v. Wilhelm*, 240

See CONTRACT, 2.

SATISFACTION.

1. Where a receipt was given by plaintiff, after the suit was commenced, but before the trial, on obtaining payment of defendant, "in full of all debts, dues and demands," it was error, on the trial, to reject the receipt when offered in evidence. *Sinamon v. Melbourn*, 309
2. Where part of a debt was paid under the announcement that it should be received in full satisfaction, and where the creditor silently acquiesced in the proposition, by taking the money; held, that in the absence of consideration, such implied promise to take part in payment of the whole debt, was not a legal satisfaction. *Sullivan v. Finn*, 544

See LEVY, 1.

STATE REVENUE, 2.

TENDER, 3.

SCHOOL DISTRICT.

1. School districts are corporations, and have the power to make contracts, &c., in relation to school houses; hence a note given by "the undersigned directors of school district No.," &c., and signed by three persons; held, that they were only liable as directors, and that it was

error to admit the note as evidence of an individual liability against the makers. *Eaker v. Chambers*, 428

2. The case of *Ament v. Humphrey*, 3, G. Greene, 255, approved as applicable to the Code. *Lemp v. Hastings*, 448

3. L. resided in school district number one, and had his store doing business in school district number two; held, that school district number one could not impose a tax upon the merchandise in said store. *ib.*

4. Where personal property has no established locality, and is not used in doing business in a county or district in which the owner does not reside, then such personal property is to be assessed and taxed as directed by § 460 of the Code. But if such property has a known locality and is used in doing business at such locality, it should be listed and taxed in the county or school district where it is thus used. *ib.*

SCHOOL FUND COMMISSIONER.

1. The compensation of a school fund commissioner, under the Code, § 1174, was allowed by the clerk, sheriff and attorney, at five hundred dollars per annum, but the superintendent of public instruction refused to approve the allowance for more than four hundred dollars per annum; held, that the superintendent was authorized thus to limit and define his approval of the allowance. *Jones v. Benton*, 40

See MANDAMUS, 1.

SCHOOL TAX.

See SCHOOL DISTRICT, 3, 4.

SCIRE FACIAS.

1. A petition is not necessary for a

scire facias, when the record of the case and the *scire facias* are in the same court. *The State v. Lighton*, 278

SEAL.

See ATTACHMENT.

SEPARATE MAINTENANCE.

1. A deed of separation acknowledged by the husband and wife may be good if not acknowledged by the trustee. *Goddard v. Beebe*, 126

See HUSBAND AND WIFE.

SERVICE BY PUBLICATION.

1. Service by publication is not good unless authorized by the court after the return of the notice to the appearance term therein designated. *Lot Two v. Sutland*, 465

2. It is the policy of the law to secure actual service of notice upon the party, against whom judicial proceedings have been commenced; and constructive service, by publication, should not be resorted to, unless the court is satisfied that every reasonable effort has been exhausted to secure actual service. *ib.*

3. Before a judgment or decree can be rendered by default, where the service has been by publication only, the proof required by § 1826 of the Code, should be satisfactorily made to the court, and the fact that such proof was made, should appear of record. *ib.*

4. The court should be satisfied that the "reasonable diligence" required by § 1826 has been exercised by *bona fide* efforts. *ib.*

5. Where the defendant did not receive personal service, nor appear, in addition to the constructive service by

publication. it should appear of record that a copy of the petition was directed to him through the post office, as required by the Code, § 1826. *Taylor v. Brobst*, 534

6. Constructive service, by publication, is not good, unless ordered by the court, after the return of the notice, "not found," to the appearance term of the court. *ib.*

See NOTICE, 7, 11, 12.

SETTLEMENT.

See FRAUD, 5.

PARTNERSHIP, 3.

SHERIFF'S BOND.

1. Where money was entrusted to the sheriff, which should have been by law paid to the clerk, the sureties in the sheriff's bonds should not be held responsible for his default, in relation to that money. They are only responsible for such money as he was officially authorized to receive. *Sample v. Davis*, 117

SHERIFF'S DEED.

See SHERIFF'S SALE, 8, 9.

SHERIFF'S SALE.

1. A motion to set aside a sheriff's sale was filed in the district court during vacation and over fifteen months after the sale; held, that the motion was made too late, and should have been overruled. *Stewart v. Marshall*, 75
2. Under the statute of 1846, the clerk, and not the sheriff, was authorized to receive the money paid to redeem land sold on execution. *Sample v. Davis*, 117
3. On a contract made in Ohio in 1840,

judgment was obtained in this state in 1845, and in 1850 land was sold to satisfy the judgment; held, that the execution defendant cannot avail himself of the remedial laws of Ohio, to avoid this sale; that the *lex fori* must prevail; and that an appraisement of the property under the valuation law was not necessary. *Shaffer v. Bolander*, 201

4. A purchase at judicial sale depends upon the judgment, levy and deed; these being unobjectionable, an innocent purchaser should not be affected by other irregularities. *ib.*

5. Where an execution sale was postponed at the request of the defendant, in consequence of which the property layed upon, materially depreciated in value; held, that the loss resulting from such postponement should not be sustained by the plaintiff. *Williams v. Garrett*, 257

6. Purchasers at judicial sales must take notice of the titles for which they bid. *Dean v. Morris*, 312

7. A purchaser cannot avoid his bid at a sheriff's sale, by showing a defective title in the judgment debtor. *ib.*

8. In an action of right, the plaintiff offered in evidence a sheriff's deed executed February 22, 1852, by virtue of a sale made December 22th, 1850, showing that the deed was executed a month before the redemption period of fifteen months had expired; but it did not appear that the deed was delivered to the purchaser before the expiration of that time; held, that the court below did not err in admitting the deed in evidence. *Warfield v. Woodward*, 366

9. Under the acts of 1843 and 1846, subjecting real and personal estate to execution, the sheriff is not precluded from executing the deed before the purchaser is entitled to it. But if such deed is delivered to the purchaser before the fifteen months have elapsed, it is still equal, at least,

to a certificate of purchase, and admissible in evidence to show a right to the property. *ib.*

10. Where a purchaser, at a sheriff's sale, gives a receipt to the execution defendant in redemption of the land, according to the execution law in force at the date of the contract, and where such redemption payment and receipt are not denied by the purchaser, he is estopped from claiming title under that sale. *Burton v. Emerson, Shields & Co., 393*

11. E., S. & Co. obtained judgment on a note dated December 20, 1842, on which *conditio exponas* was issued April 8, 1846, and a levy and sale were made under the valuation law of 1843; held, that as the execution returned and the deed, showed that the sheriff exercised his powers and conducted the sale, exclusively under the valuation law after it had been repealed; and as the contract was made before that law took effect, the deed was *prima facie* void, and could impart no title. *ib.*

12. The execution law in force at the time of a contract, enters into and becomes a part of the contract; and where such contract is enforced under execution sale, such sale should be conducted in harmony with the law of the contract, so as to leave the rights of parties unimpaired. *ib.*

13. The Code directs execution sales to be made between nine o'clock in the forenoon and four o'clock in the afternoon; but where a notice of sale fixed the time of sale as between the hours of two and five o'clock in the afternoon; held, that a valid sale might be made under such notice, as it will not be presumed that the officer sold the property after the time directed by the Code. *Cole v. Porter, 510*

See JUDICIAL SALE:
FRAUD. 4.

SLANDER.

1. In an action of slander, words are *per se* actionable, where they charge a woman "of being a bad character" and "guilty of fornication;" and where such words were spoken falsely and maliciously of a *female* sole, she is entitled to recover without averring or proving special damages. *Dailey v. Reynolds, 354*

SPECIFIC PERFORMANCE.

1. Under a contract for land, the entire consideration money should be paid before an unconditional decree for specific performance is rendered. *Jones v. Alley, 181*
2. Where a title bond stipulated not only that the land should be paid for, but also that the obligee should pay the "costs and charges" of the conveyance; and where the price of the land had been paid, such "costs and charges" should also be proffered and a deed demanded before a right of action accrues. *Wright v. LeClair, 420*

See PARTNERSHIP, 2.

STATE REVENUE.

1. A county judge does not possess the power to settle with the treasurer and collector for the state revenue collected by him, nor to discharge him and his securities from their liability to the state upon the bond required by the revenue law of 1847. *Ford v. Jefferson County, 273*
2. The cancellation of a bond by an officer not authorized, is no evidence of satisfaction. *ib.*

See COUNTY COLLECTOR AND
TREASURER, 2.

STATUTE.

1. Every statute which takes away, or impairs vested rights, acquired under previous laws, must be considered retrospective, and opposed to sound principles of jurisprudence. *Davis v. O'Ferrall*, 163
2. The execution law in force at the time of a contract, enters into and becomes a part of that contract, so far as its obligations and liabilities are concerned; but such portions of an execution law, as are merely remedial, do not affect such obligations, and may be changed or modified by subsequent legislation. *Coriell v. Ham*, 455
3. The substantial rights of parties, under a contract, cannot be changed or impaired by subsequent laws; but the method of enforcing those rights may be changed. *ib.*
4. A parole promise to pay the debt of another, without consideration, is void by the statute of frauds, even if that promise was made by a party who signed the note as security or indorser. *ib.*
5. All contracts for the sale of land, or for any interest in or concerning them, should be in writing; hence, an agreement by B. to relinquish a purchase of lots to P., upon condition that P. would pay B.'s note to D., which was signed by P. as security, should be in writing. *ib.*
6. A verbal contract for two lots, to be paid for in printing and cash, is within the statute of frauds, if no part of the stipulated price had been paid, and if the vendee did not acquire possession of the premises. *Morgan v. McLaren*, 536

See DOWES, 3, 4.

See TRUST, 1.

STATUTE OF FRAUDS.

1. A parole contract to deliver hogs at a future day may be valid under the statute of frauds, as qualified by § 2411 of the Code. *Bennet v. Nye*, 410
2. The facts which will bring a parole contract within § 2411, may exist and be established outside of the stipulation in such contract. *ib.*
3. B., as principal, and P., as security, signed a note to D., for town lots purchased by B. Before the note matured, B. proposed that he would relinquish the lots to P., if P. would pay the note, and save B. harmless. B. soon after left the State. After judgment was obtained against P. on the note, he paid the same; and subsequently, in a suit against B. for the amount, B. proposed to prove by parole, the agreement under which P. was to pay the note, and B. relinquish to him the lots; held, that parole proof was not admissible, and that such an agreement, unless in writing, is within the statute of frauds, and void. *Bumford v. Purcell*, 488

STATUTE OF LIMITATION.

1. Where the statute of limitation is pleaded in bar to an action, a replication, resting upon the facts, that the plaintiff was a non-resident, and that the contract was made in another state, is demurrable. *Bruce v. Luck*, 143
2. Where a cause of action on a written instrument had accrued, but was not barred at the time the Code took effect, the time allowed for the commencement of the action would be five years from July 1, 1851. *Roop v. Seaton*, 253
3. In an action for the specific performance of the conditions of a title bond, where the facts set forth in the petition would take the case out of the statute of limitations, that statute cannot be successfully pleaded, unless such averments in the petition are denied by an accompanying answer; and in such case, the issue of facts presented by the denials in the answer, should be tried. *Wright v. LeClair*, 430
4. A title bond for land cannot be

barred under the fourth section of the act of 1843, for the limitation of actions. *ib.*

5. The fourth section of the statute of limitation of 1843, cannot be pleaded in bar to an action founded upon a judgment rendered before a justice of the peace in this state. *Danemuller v. Burton*, 445

6. The certified transcript of a justice of the peace is made by law as conclusive in the courts of this state, for certain purposes, as the transcript of a court of record, and for that reason, the fifth section of the statute of limitations would seem appropriate to actions founded upon transcripts from justices' courts. *ib.*

7. In *Bruce v. Luck*, ante 143, the question is not decided whether an action founded upon a justice's transcript from another state, is within the fourth section of the limitation law of 1843. *ib.*

STEAMBOAT.

1. A general judgment on a note for services rendered to a steamboat, cannot have the effect of a preferred claim under the act of 1847, unless the judgment specify and fix the lien. *Miller v. Galland*, 191

2. Under the act of 1838, authorizing attachments against boats and vessels, the jurisdiction of the district court does not depend upon the strict regularity of the officer's return, when the proceedings in other respects were fully authorized. *ib.*

See COMMON CARRIER, 1.

STOCK SUBSCRIPTION.

See CONTRACT, 1.

PLANK ROAD COMPANY, 1.
PLEADING, 2.

STREETS.

1. The city of Keokuk is authorized by its charter to establish and regulate the grade of streets. *Oreal v. City of Keokuk*, 47

2. A city authorized to establish and regulate the grade of streets, is not liable for damages growing out of the proper exercise of that authority. *ib.*

3. The power to regulate the grade of streets comprises the power to change the grade, without incurring liability for the prudent exercise of that power. *ib.*

SUPREME COURT.

1. The supreme court will only try and determine such matters as appear of record. *Partridge v. Corkery*, 383.

2. A petition for rehearing should not be favored by the supreme court, unless applied for at the time the judgment was rendered. *Emerson & Shields v. Tomlinson*, 398.

3. After rights are vested, under a decision of the supreme court, no discretionary power can be exercised by that court to change or set aside such decision. *ib.*

4. The court will not presume a state of facts, which would make the following charge to the jury erroneous: "That if the enclosures of the defendant were not protected by a good and sufficient fence, such as would protect his crops from stock not breachy, that he could not be allowed his damages." *Lawsen v. Campbell & Brother*, 413

5. In an action upon an injunction bond, extraneous matter in reference to the injunction proceedings, and which are not of record in the case, and were not considered by the court below, will not be entertained by the supreme court. *Dean v. Hall*, 436

6. Where objections were not raised

in the district court, they will not be favored in the supreme court. *ib.*

7. Where a principle has been recognized by the supreme court it should not be overruled unless it is palpably wrong, or has been changed by legislative enactment. *Lemp v. Hastings*, 448

8. This court will not entertain errors which do not appear of record. *Parker v. Pierce*, 452

9. The affidavits of a newspaper publisher, that a notice of a mortgage sale was duly made, cannot be objected to in the supreme court unless the objection was first made in the court below. *Rowan v. Lamb*, 468

10. Where an objection to pleadings was not first raised in the court below, it should not be entertained by the supreme court. *Hunt v. Bennett*, 512

11. The supreme court will not consider new causes of demurrer, which were not presented to the court below. *Bridgman v. Wilder*, 563

12. Supreme Court Rules, 570

SUPERINTENDENTS OF PUBLIC INSTRUCTION.

See SCHOOL FUND COMMISSIONER

SUPERVISOR.

1. Where a plea in abatement put in issue plaintiff's right to the office of supervisor, it was incumbent upon him to show that he held the office by right. *Davis v. Moffitt*, 92

SURETIES.

See SHERIFF'S BONDS.

T

TAX TITLE.

1. In a proceeding to foreclose the equity of redemption to land held by tax title, a party holding the sheriff's certificate of purchase of the same land on execution sale, is sufficiently interested to appear as defendant. *Brobst v. Thompson*, 135

TENDER.

1. It is essential to the validity of a tender of money, that he who makes the tender should have the money in court. The necessity for this rule is not obviated by the Code. *KINNEY, J., contra. Johnson v. Triggs*, 97

2. If a tender was not claimed on the trial before a justice, it should not be entertained on appeal in the district court. *ib.*

3. A tender of the amount due, does not satisfy the demand, but if kept good, it stops interest and saves cost. *ib.*

4. A tender admits the plaintiff's cause of action to the amount of the sum tendered. *ib.*

5. A tender admits the liability or indebtedness to the amount of the sum tendered. *Frink v. Coe*, 555

TITLE.

1. Where title is derived from trustees, who had the legal title as well as the power to sell, such title can only be divested by direct proceeding in chancery, and can only be overcome by a paramount antecedent title. *Rowan v. Lamb*, 468

See COUNTY COURT, 4.

• DEED OF TRUST, 1.

JUDICIAL SALE.

SHERIFF'S SALE.

TITLE BOND.

- See* SPECIFIC PERFORMANCE, 2.
 STATUTE OF LIMITATION, 4.

TRANSCRIPT.

1. Where a justice of the peace sent up to the district court an amended transcript, on discovering an omission in the one first sent up, and within the time required for the returning of the transcript in appeal cases, it is error in the district court to reject such amended transcript. *Smith v. Snodgrass*, 282

2. Where there is good reason for believing that a full and true transcript has not been sent up from a justice of the peace, and where application was made within a reasonable time for a rule to perfect the record, it is error to refuse such rule. *Atwater v. Woodward*, 431

See STATUTE OF LIMITATIONS, 6, 7.

TRESPASS.

1. In an action to recover the value of an elk killed by defendant, and where he set up in defense that the elk was trespassing upon his enclosure, and had introduced evidence to show the value of the elk; held, that the plaintiff should be permitted to give rebutting evidence in reference to the trespass and the value of the elk. *Lawson v. Campbell & Brother*, 413

See PLEADING, 17.

TRUST.

1. M. held a claim on one-quarter of a quarter section of land, and contracted with S. for one-quarter of a one hundred and sixty acre land warrant, with the understanding that S. should enter the quarter section of land in his own name, and deed to M. his portion. After enter-

ing the land, S. recognized the arrangement in two or three transactions, but finally, when M. tendered to him the price stipulated for one-fourth of the warrant, S. refused to make the deed; held, that the circumstances and equities removed the case from the statute of fraud, and created a trust which should be enforced against S. *McIntire v. Skinner*, 89

2. An oral trust may be established by parole testimony, if a voluntary acknowledgment can be proved. *ib.*

3. A resulting trust may be established by parole proof. *ib.*

4. Where a petition does not set out a case of trust nor pray for relief for that cause, it cannot present a case for equity jurisdiction on the ground of trust. *Clausen v. Lafrens*, 224

See DEED OF TRUST, 1.
 TITLE, 1.

V

VALUATION LAW.

See SHERIFF'S SALE, 11.

VARIANCE.

1. The petition is the foundation of the action, and the notice should conform to it; and in case of variance, the discrepancy should fall upon the notice. Such discrepancy is cured by appearance. *Prink & Co. v. Whicher*, 382

See PRACTICE, 8.

VERDICT.

1. An informal or ambiguous verdict may be corrected or explained at any

time before the jury is discharged
Orton v. The State, 140

See EVIDENCE, 13.

VESTED RIGHTS.

See STATUTE, 1.

W

WITNESS.

1. A witness is entitled to fees from the county for his attendance in a criminal cause on a preliminary examination before a justice of the peace. *Johnson County v. Porter*, 79
2. A defendant called upon as a witness by the opposite party, may, under the Code, testify to facts affecting himself, but not to facts calculated to transfer the liability from himself to the separate property of his co-defendants. *Merchand & Co. v. Cook*, 115
3. A witness should be required to state facts, and not his opinion, except on questions of science, skill or trade, in relation to which he is an

expert. *Whilmore v. Bowman*, 148

4. Upon questions wherein the jurors are as well qualified to form an opinion as the witnesses, the opinion of the latter should not be received in evidence. *ib.*
5. As a general rule, witnesses are to state such facts as are relevant to the issue, and from those facts the jury are to draw their own conclusions. *ib.*
6. A witness whose name is not indorsed on the indictment, if objected to, should not be permitted to testify in behalf of the State. *Smith v. The State*, 189
7. Where it appeared that E. Kimberling was a witness before the grand jury, although the name indorsed on the indictment was "E. Kimberling," he was properly admitted as a witness on the trial. *Houston v. State*, 437

See DEPOSITIONS, 3.

WRIT OF ERROR.

See APPEAL, 5.

Ex. J. F. H.

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